



# *Military Law Review*

## **A PROSECUTORIAL GUIDE TO COURT-MARTIAL SENTENCING**

**Major Larry A. Gaydos**

## **TO DETERMINE AN APPROPRIATE SENTENCE: SENTENCING IN THE MILITARY JUSTICE SYSTEM**

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# A Prosecutorial Guide to Court-Martial Sentencing

Major Larry A. Gaydos\*

"I just came from a three year assignment as a Brigade Commander in Germany. During 18 months of that tour I served as a member of a court-martial panel. Why do military trial counsel always roll-over on sentencing?"<sup>1</sup>

## I. INTRODUCTION

Historically the sentencing phase of the court-martial has been the defense counsel's show. The 1969 Manual for Courts-Martial<sup>2</sup> intentionally limited the trial counsel's role to the presentation of narrowly specified matters in aggravation<sup>3</sup> while the defense counsel had virtually unfettered opportunity to present matters in extenuation and mitigation.<sup>4</sup> An aggressive trial counsel's sentencing strategy usually consisted of preparing an extensive rebuttal case and waiting for the defense counsel to open the door. The government often wasted substantial resources by having the accused's entire chain-of-command sitting in the witness waiting room while the defense counsel carefully walked

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\*Judge Advocate General's Corps, United States Army Reserve. Currently Associate, Haynes and Boone, Dallas, Texas. Formerly assigned as Instructor, Criminal Law Division, The Judge Advocate General's School, U.S. Army, 1983 to 1986; Senior Defense Counsel, Hanau, Federal Republic of Germany, 1979 to 1981; Trial Counsel, 3d Armored Division, Hanau, Federal Republic of Germany, 1978 to 1979. B.A., United States Military Academy, 1973; J.D., University of Virginia Law School, 1978. Completed 31st Judge Advocate Officer Graduate Course, 1983. Author of *A Comprehensive Guide to the Military Pretrial Investigation*, 111 Mil. L. Rev. 49 (1986); *The SJA as the Commander's Lawyer: A Realistic Proposal*, The Army Lawyer, Aug. 1983, at 14; *Client Perjury: A Guide for Military Defense Counsel*, The Army Lawyer, Sept. 1983, at 13; *The Randolph-Sheppard Act: A Trap for the Unwary Judge Advocate*, The Army Lawyer, Feb. 1984, at 21; *New Developments in Impeachment of Verdicts*, The Army Lawyer, Oct. 1985, at 38; *Providence Inquiry — New Source of Prosecution Evidence?*, The Army Lawyer, June 1986, at 68. Coauthor of *A Methodology for Analyzing Aggravation Evidence*, The Army Lawyer, July 1986, at 6. Contributing author of *Significant Decisions of the Court of Military Appeals*, 103 Mil. L. Rev. 79 (1986); *The 1964 Manual for Courts-Martial: Significant Changes and Potential Issues*, The Army Lawyer, July 1984, at 1. Member of the bars of the Commonwealth of Virginia, the United States Court of Appeals for the Fourth Circuit, the United States Court of Military Appeals, and the Supreme Court of the United States.

<sup>1</sup>Question from Brigade Commander attending the Senior Officers Legal Orientation Course at The Judge Advocate General's School, Charlottesville, Virginia (Nov. 8, 1985).

<sup>2</sup>Manual for Courts-Martial, United States, 1969 (Rev. ed.) [hereinafter MCM, 1969].

<sup>3</sup>See MCM, 1969, para. 75b.

<sup>4</sup>See MCM, 1969, para. 75c.

the extenuation and mitigation tightrope. The skilled defense counsel could make the chain-of-command's trip to the courtroom fruitless by presenting only those matters which created a favorable impression about the accused without opening the door to any specific rebuttal evidence. Perhaps because of the frustration associated with this type of defense strategy, many trial counsel chose to concede the sentencing portion of the trial.

In the last few years the rules applicable to court-martial sentencing have changed, and there is every expectation that they will continue to change, in favor of the prosecution.<sup>5</sup> Although the Manual and the courts have greatly expanded the potential for prosecutorial sentencing evidence, trial counsel seemingly have not changed their sentencing practice. Sentencing procedures are intended to be adversarial in nature. Trial counsel (or trial judges) who fail to let the system work do a disservice to the government. The purpose of this article is to provide trial counsel with a comprehensive guide to the court-martial sentencing process including a survey of advocacy techniques for aggressive prosecution, a thorough discussion of the developing substantive law concerning admissible sentencing evidence, an outline of sentencing procedures, and a guide to permissible punishments at courts-martial.

## II. PROSECUTORIAL SENTENCING PHILOSOPHY

To be a successful prosecutor, an attorney obviously must have a command of the law applicable to sentencing. What may be less obvious is that the first step toward success actually is to develop an appropriate "philosophy" about sentencing. The trial counsel must be aggressive without being overbearing.

### *A. Ethical Perspective*

At a recent general court-martial sentencing proceeding, the defense counsel argued that the accused could be rehabilitated and should not be given a punitive discharge. The trial counsel "argued" that he agreed. When confronted after the trial by the staff judge advocate, the trial counsel explained that he thought a

<sup>5</sup>For a discussion of sentencing changes in the 1984 Manual for Courts-Martial, see generally The Instructors of the Criminal Law Division (TJAGSA), *The 1984 Manual for Courts-Martial: Significant Changes and Potential Issues*, The Army Lawyer, July 1984, at 1.

sentence excluding a punitive discharge was reasonable under the circumstances and thus he had an ethical obligation to seek justice by arguing against a punitive discharge.

The ABA Code of Professional Responsibility does, in fact, state that the duty of the public prosecutor is to "seek justice."<sup>6</sup> Unfortunately, the ethics standards do not further define that general obligation. A military trial counsel satisfies the general duty to "seek justice" by complying with the specific ethical obligations regarding initiation of charges,<sup>7</sup> disclosure of exculpa-

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<sup>6</sup>Model Code of Professional Responsibility EC 7-13 (1980). Perhaps the best articulation of this concept was penned by the Supreme Court, which used the following passage to describe the role of the federal prosecutor:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense, the servant of the law, the twofold aim of which is that guilty shall not escape or innocent suffer. He may prosecute with earnestness and vigor—indeed he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935).

<sup>7</sup>Even though the trial counsel exercises no direct control over the convening authority's exercise of prosecutorial discretion the ethical standards do not absolve the military trial counsel from all responsibility in the charging process.

Military trial counsel may not personally prefer court-martial charges against an accused unless they have personal knowledge of, or have investigated, the matters set forth in the charges and they believe that the charges are true in fact to the best of their knowledge and belief. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 307(b)(2) discussion [hereinafter R.C.M. 307(b)(2) discussion]. Military trial counsel (and staff judge advocates) are ethically precluded from instituting criminal charges or causing criminal charges to be instituted when they know or it is obvious that the charges are not supported by probable cause. Model Code of Professional Responsibility DR 7-103(A)(1980). It is likewise unprofessional conduct for a trial counsel to permit the continued pendency of criminal charges when it is known that the charges are not supported by probable cause. Finally, a trial counsel *should not* institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction. Standards for Criminal Justice 3-3.9(a)(1979).

A military trial counsel does not have prosecutorial discretion and cannot preclude the convening authority from going forward with charges which are not supported by probable cause. The military trial counsel fulfills his or her ethical obligation by informing the convening authority of the defects in the charges, or deficiencies in the evidence supporting the charges, and advising against prosecution. Model Code of Professional Responsibility EC 7-14 (1980). If the convening authority considers the advice and nevertheless orders the prosecution of the case, the trial counsel may ethically prosecute in the name of the United States. Model Code of Professional Responsibility EC 7-14 (1980). Accord R.C.M. 502(d)(5)(A) discussion.



tory evidence,<sup>8</sup> and candor toward the tribunal<sup>9</sup> contained in the Code of Professional Responsibility and the ABA Standards for Criminal Justice.<sup>10</sup>

In the military, the convening authority, not the trial counsel, exercises prosecutorial discretion.<sup>11</sup> The trial counsel's duty to seek justice does *not* mean that the trial counsel must substitute his or her subjective judgment about what is an appropriate sentence for the convening authority's judgment. The trial counsel's advisory opinion concerning an appropriate sentence can be given to the convening authority before trial to assist the convening authority in making a referral decision<sup>12</sup> and an advisory recommendation on sentence appropriateness can be

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"Trial counsel have an ethical obligation to make timely disclosure to the defense of all evidence that "tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." Model Code of Professional Responsibility DR 7-103(B) (1980); Standard for Criminal Justice 3-3.11(a) (1979).

<sup>10</sup>Model Code of Professional Responsibility DR 7-102, DR 7-106 (1980).

<sup>11</sup>The Manual for Courts-Martial provides that the Judge Advocate General of each service may prescribe rules "to govern the professional supervision and discipline of military trial and appellate judges, judge advocates, and other lawyers who practice in proceedings governed by the Code and this Manual." R.C.M. 109(a).

Army Regulation 27-1, which governs the Judge Advocate Legal Service, provides that:

All JAs and civilian attorneys of the JALS are subject to those statutes, directives, and regulations that govern the rendering of legal services within the Army. To the extent they do not conflict with these statutes, directives, and regulations, the following are applicable to all JAs and civilian attorneys of the JALS:

- a. The American Bar Association Code of Professional Responsibility including the canons, ethical considerations, and disciplinary rules.
- b. The Code of Judicial Conduct.

Dep't of Army, Reg. No. 27-1, Legal Services-Judge Advocate Legal Service, para. 5-3 (1 Aug. 1984) [hereinafter AR 27-1].

Army Regulation 27-10 governing military justice provides that:

The Code of Judicial Conduct and Model Code of Professional Responsibility of the American Bar Association are applicable . . . to judges and lawyers involved in court-martial proceedings in the Army . . . . Unless they are clearly inconsistent with the UCMJ, the MCM, and applicable departmental regulations, the American Bar Association Standards for Criminal Justice also apply to military judges, counsel, and clerical support personnel of Army courts-martial.

Dep't of Army, Reg. No. 27-10, Legal Services-Military Justice, para. 5-8 (10 Dec. 1985) [hereinafter AR 27-10].

<sup>12</sup>R.C.M. 601(a) (Only a convening authority has the power to order trial by court-martial).

<sup>13</sup>R.C.M. 502(d)(5)(A) discussion. If general court-martial is contemplated, this information should normally be supplied directly to the staff judge advocate, who can incorporate it in the pretrial advice. R.C.M. 406.



made after the trial to assist the convening authority in exercising clemency authority.<sup>13</sup> At trial, the trial counsel represents the convening authority's interest<sup>14</sup> and has an ethical obligation to represent those interests "zealously within the bounds of the law."<sup>15</sup> The trial counsel satisfies all ethical obligations, and will be most successful, by following two rules: always argue for the maximum credible punishment; and if the maximum credible punishment is less than the maximum allowable punishment, argue for a specific sentence only with prior approval of the staff judge advocate.

As a general rule, the only time a trial counsel should not argue for the maximum allowable punishment is when it is clearly not warranted *and* arguing for the maximum punishment will not be credible. The trial counsel's decision to argue for less than the maximum punishment should be based on trial tactics — *not* the subjective evaluation of what constitutes a reasonable punishment.

When the maximum allowable punishment is not credible, the trial counsel can argue for some specific lesser punishment (*e.g.*, 5 days hard labor without confinement);<sup>16</sup> for a specific type of punishment without designating a specific quantity (*e.g.*, confinement or a substantial period of confinement); or for "an appropriate sentence." Asking for a specific lesser punishment is potentially dangerous because it may place a ceiling on the amount of punishment which will be considered by the sentencing authority. When the trial counsel asks for "5 years confinement," he or she is saying, "The maximum is 10 years and that is your starting point. Based on the facts of the case and the defense evidence in extenuation and mitigation, this accused deserves 5 years confinement." As a practical matter, the court members may erroneously interpret trial counsel's remarks as, "The trial counsel is asking for no more than 5 years confinement. That is our starting point. Now, based on the extenuation and mitigation presented by the

<sup>13</sup>After a general court-martial this information should normally be supplied to the staff judge advocate, who can incorporate it in the post-trial recommendation. R.C.M. 1106.

<sup>14</sup>R.C.M. 502(d)(5)(A) discussion.

<sup>15</sup>Model Code of Professional Responsibility Canon 7 (1980).

<sup>16</sup>United States v. Higdon, 2 M.J. 445 (A.C.M.R. 1975) (trial counsel can argue for a specific sentence so long as counsel does not express or intimate that the convening authority desires that particular sentence); United States v. Tschida, 1 M.J. 997, 1003 (N.C.M.R. 1976) (trial counsel may make argument for an appropriate sentence, may properly ask for a severe sentence, and may request court members to return a specific sentence); United States v. Coleman, 41 C.M.R. 953 (A.F.C.M.R. 1970) (trial counsel can argue for the maximum punishment).

defense, how much of a break does the accused deserve?" The prudent trial counsel should get the staff judge advocate's approval before setting any artificial limit on the sentencing authority's discretion.

### *B. Contested vs. Guilty Plea Cases*

Many trial counsel approach sentencing at a guilty plea case differently than they approach sentencing in a case which is contested on the merits. Interestingly, some trial counsel routinely neglect the sentencing portion of the contested case while other trial counsel routinely neglect the sentencing portion of plea bargained guilty plea cases. Both types of counsel are derelict.

In a fully contested case, counsel for both sides necessarily place primary emphasis on the merits of the case. It is a mistake, however, for trial counsel to neglect sentencing preparation or to feel that getting a conviction ends their responsibility. If the court members had any doubts about the accused's guilt during the findings portion of the case, they may carry those doubts into sentencing and may reach a compromise sentence which is inappropriately lenient considering the seriousness of the crime committed. During presentencing the trial counsel has the difficult burden of persuading all the court members, including those who may have voted for complete acquittal, to accept the collective judgment of the court and adjudge a sentence which is appropriate for a criminal convicted of that crime.

In a guilty plea case, where the accused has the benefit of a pretrial agreement, trial counsel may be tempted to neglect the sentencing proceeding because it may appear that the government has little to gain. This is especially true in a trial by military judge alone when the judge's sentencing track record has made sentencing predictable and it is clear that the accused has no realistic possibility of "beating the deal." There are several reasons why trial counsel should always be aggressive in trying to get the maximum possible sentence adjudged. First, the sentences actually adjudged for specific crimes usually define the parameters for pretrial agreement negotiations in subsequent cases. Second, when the pretrial agreement contains a clause authorizing cancellation because of subsequent misconduct, higher adjudged sentences provide more motivation for the accused to avoid misconduct.<sup>17</sup> Finally, the record of trial will have to stand by

<sup>17</sup>Post-trial misconduct clauses are permissible so long as they do not allow arbitrary revocation of the pretrial agreement. R.C.M. 705(c)(2)(D); *United States v. Dawson*, 10 M.J. 142 (C.M.A. 1982).

itself when appellate authorities determine sentence appropriateness.<sup>18</sup> At the appellate level, the accused's sentence will generally be compared to the sentences received by other soldiers convicted of the same offense.<sup>19</sup> A grossly disproportionate sentence will have a better chance of withstanding scrutiny if the trial counsel has presented all available aggravation evidence.<sup>20</sup>

### III. PRETRIAL PREPARATION

The key to success at the sentencing phase of a court-martial is thorough pretrial preparation. Thorough preparation requires systematic gathering of sentencing evidence throughout the processing of a case. There is a logical tendency to prepare a case "chronologically." First counsel worry about motions, then the contested issues on the merits, and finally sentencing. Preparation for sentencing should begin as soon as charges are preferred and should continue throughout the pretrial processing of the case.<sup>21</sup> It is important to begin preparation early because sentencing evidence often affects plea bargaining, witness availability may later become a problem, and documentary evidence may have to be obtained from some distant source. When witnesses are interviewed concerning pretrial motions or the merits of the case, counsel should also ask about sentencing related matters. Trial counsel should prepare for sentencing the same way they prepare to prove the elements of the offense.

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<sup>18</sup>The courts of military review may affirm a sentence only if it is correct in law and fact and is determined appropriate on the basis of the entire record. Uniform Code of Military Justice art. 66(b), 10 U.S.C. § 866 (1982) [hereinafter UCMJ]. The courts of military review do have the authority to gather additional facts by obtaining affidavits from the parties or by returning the record of trial to a trial judge for a limited hearing. *United States v. Dubay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967).

<sup>19</sup>*United States v. Ballard*, 20 M.J. 282 (C.M.A. 1985) (courts of military review are permitted, but not required, to consider sentences adjudged in other cases when determining sentence appropriateness); *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982) (sentence comparison is one factor the courts of military review may consider when determining sentence appropriateness); *United States v. Olinger*, 12 M.J. 458 (C.M.A. 1982) (sentence comparison is required only when there are highly disparate sentences in closely related cases).

<sup>20</sup>Sentence reassessment is required only when there are highly disparate sentences in "closely related cases." Even co-accused convicted of the same offense could legitimately receive highly disparate sentences where the aggravating factors applicable to one accused justify a greater sentence. See generally *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982).

<sup>21</sup>The point in time where trial counsel become involved with a case varies from jurisdiction to jurisdiction. In jurisdictions where counsel become involved before preferral of charges, sentencing preparation should begin immediately.

### A. The "Elements" of Sentencing

As any defense counsel can attest, there are only a limited number of approaches the defense can take during the sentencing phase of a court-martial. After observing a dozen courts-martial, a trial counsel has probably seen every conceivable defense sentencing strategy. The defense invariably argues that the accused deserves a lenient sentence because of one or more of the following extenuating and mitigating circumstances:<sup>22</sup>

1. The accused's past good service.
2. The accused's potential for future valuable service.
3. The accused will not commit future crimes.
4. Harsh punishment will punish the accused's family.
5. The accused has a problem that requires medical, psychiatric, or social treatment.
6. The accused has already been punished.
7. The accused is remorseful.
8. The accused wants to stay in the Army.
9. The accused has personal debts.
10. Harsh punishment would be disproportionate to the punishment others have received.
11. Harsh punishment would ruin the accused for the rest of his life.
12. The accused committed the crime because of some external factor (bad crowd, drugs, alcohol).

Although there are many factual variations, the above themes cover the entire spectrum of possible defense sentencing strategies. In every case the trial counsel should attempt to anticipate which strategy the defense counsel will employ and should accumulate evidence to rebut that argument. In planning the government case it is important for trial counsel to think in terms of the case in rebuttal as well as the case in aggravation.<sup>23</sup>

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<sup>22</sup>Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of the offense, including those reasons for committing the offense which do not constitute a legal justification or excuse. R.C.M. 1001(c)(1)(A).

Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency. It includes the fact that nonjudicial punishment under Article 15 has been imposed for an offense growing out of the same act or omission, particular acts of good conduct or bravery, an evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other desirable trait in a servicemember. R.C.M. 1001(c)(1)(B).

<sup>23</sup>Compare R.C.M. 1001(b) (the case in aggravation) with R.C.M. 1001(d) (the case in rebuttal).

For example, it is common for accused to testify during sentencing that they like the Army and want to make the service a career. A prudent trial counsel should anticipate that in almost every case this is a possible defense strategy. The trial counsel should interview the accused's roommates to discover whether the accused truly contemplated a career in the service or whether (as is more likely) the accused frequently voiced displeasure about the service, kept a short-timers calendar counting down the number of days remaining in the military, and talked about the future civilian employment he or she had already arranged back in his or her hometown. If the accused's roommates are going to be witnesses during the merits of the case, questions relating to sentencing rebuttal should be part of the trial counsel's interview concerning the merits of the case. Including sentencing matters in all interviews will allow the trial counsel to develop more complete sentencing evidence and may enable the trial counsel to conceal or disguise the government's sentencing strategy.

### ***B. Witness Interviewing***

There should be three phases to the sentencing witness interview process. During phase one the trial counsel should get a quick assessment of the accused's character from the accused's chain of command. Ideally this information should be elicited contemporaneous with the preferral of charges so that it can be considered in determining an appropriate level of referral. Personal, face-to-face, interviews are usually the most effective way to get this preliminary character assessment but lack of available time will frequently force counsel to use some alternate method. In an especially busy criminal jurisdiction, trial counsel may want to create a standard form that the chain of command can complete and forward with the charges (see Appendix A).

The second phase consists of the in-depth sentencing interview. Because there are always time constraints on case preparation, counsel should develop a plan of expanding interviews—increasing the number of people interviewed and the scope of the individual interviews as much as time permits. It is a mistake to interview only the chain of command. The accused's chain of command is only one source of information, and in some cases, not even the best source. Other sources of information which should be explored include the accused's roommates and "good soldiers" who live or work with the accused. The accused's roommates often are good friends of the accused and are going to be reluctant to discuss negative aspects of the accused's character.

They may, however, be an important source of rebuttal evidence concerning the accused's future employment plans, financial status and spending habits, attitude toward military service, and attitude about the charged offenses. If the accused is a bad soldier who frequently engages in misconduct the good soldiers who live around, or work with, the accused are likely to be the best source of such information. A good non-commissioned officer who lives in the same billets as the accused may know much more about the accused's off-duty conduct than the accused's section chief or first sergeant. If the accused is in pretrial confinement, the guards at the confinement facility,<sup>24</sup> the soldiers that escort the accused to and from the confinement facility,<sup>25</sup> and other prisoners<sup>26</sup> may provide valuable sentencing information concerning the accused's attitude toward the charged offenses and subsequent misconduct during confinement.

The key to effective interviewing is to anticipate what type of rebuttal evidence might become admissible at trial and explore those areas thoroughly. Thorough exploration means that counsel must ask for the same information in more than one way. Asking a witness "whether the accused's duty performance is poor, average, or outstanding" does not constitute an effective sentencing interview. First, the witness may define "duty performance" as actual on-the-job performance or may define it more expansively to include soldierly conduct after normal work hours. Second, an "outstanding" rating may not mean the same thing to both the witness and the interviewer. The witness may think that all of the soldiers under his or her supervision are outstanding or may be more restrictive in thinking that only the single best soldier in the unit is truly outstanding. An effective interview must be more than a rating checklist. The witness should be asked to give narrative responses describing the accused's character, duty performance, personality, soldiering skills, and off-duty conduct. Whenever possible, subjective ratings should be given perspective by requiring the witness to make objective assess-

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<sup>24</sup>Trial counsel should be careful not to infringe on the accused's right against self-incrimination or right to counsel. It would be improper for counsel to ask a guard to initiate contact with the accused for the purpose of eliciting incriminating information or discussing matters related to the charged offenses. It would not be improper to ask the guard whether the accused, at some time in the past, initiated contact with the guard and discussed matters related to the charged offenses. See generally *Mil. R. Evid.* 305(e); *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976); *United States v. Grisham*, 4 C.M.A. 694, 16 C.M.R. 268 (1954).

<sup>25</sup>See *supra* note 24.

<sup>26</sup>See *id.* Trial counsel should also be careful not to infringe on the prisoner's rights and must scrupulously avoid talking to prisoners about their charged offenses.



ments. Ask the witness to actually name the soldiers in the unit who rank below or above the accused. Finally, vary the phrasing of the question. The following questions are intended to address the same general sentencing consideration but may elicit strikingly dissimilar responses from the same witness.

Q. Should the accused be discharged from the Army?

Q. In your opinion, does the accused have potential for rehabilitation?

Q. Of the X soldiers who work for you, where would you rate the accused's potential to serve in the future as an NCO?

Q. Can the accused be salvaged?

Q. Would you want the accused returned to your unit without having served confinement?

A witness may opine that the accused has rehabilitative potential and should not be discharged from the service but at the same time agree that the accused is one of the worst soldiers in the unit, should spend some time in jail and would never make a good NCO. cursory interviews may result in a complete misunderstanding of the witness's position.

The third interviewing phase should consist of a brief follow-up contact as close to the trial date as possible. It is good trial practice to interview all witnesses before and after opposing counsel has interviewed them. The brief interview before in-court testimony should ascertain whether the witnesses have changed their mind about anything previously discussed and whether any witness has been able to remember additional information which wasn't discussed at the previous interview. It is also proper to ask the witness what questions opposing counsel asked during their interview. This information is not privileged and may provide useful insight into opposing counsel's sentencing strategy.

### *C. Documentary Evidence Collection*

Documentary evidence collection should begin as soon as the trial counsel is assigned the case.<sup>27</sup> Early preparation will allow time to cure defects in authentication,<sup>28</sup> will allow follow-up on evidentiary leads obtained from the documents, and will insure that trial counsel has a complete picture of the accused if the defense counsel initiates plea bargaining. Document searches are a

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<sup>27</sup>For a general listing of documents admissible during the case in aggravation, see generally R.C.M. 1001(b).

<sup>28</sup>See generally Mil. R. Evid. 901, 902.

recurring part of trial practice so trial counsel should establish a system or routine that will efficiently accomplish the task. Ideally, the trial counsel will have a legal specialist to make periodic visits to the servicing personnel and finance offices. If clerical and administrative support within the SJA office is scarce, trial counsel may persuade the command to absorb some of the support burden by requiring that certain specified personnel documents accompany the charge sheet. Trial counsel should not overlook having the investigative agency run a National Crime Information Check on the accused. This will be important in examining the accuracy of enlistment or appointment records. Alternatively, trial counsel can rely on the local distribution system and file written requests for documents.

Many of the advocacy techniques applicable to witness interviewing are equally applicable to assembly of sentencing documents. While primary emphasis is necessarily placed on documents admissible as aggravation,<sup>29</sup> counsel should also be alert to matters which may be admissible in rebuttal after the defense counsel opens the door.<sup>30</sup>

Trial counsel should also expand the scope of document collection as much as time permits. The military personnel records jacket (MPRJ) and finance records obviously must be reviewed in every case. Thorough preparation should also include a review of unit files for counselling statements, letters of indebtedness, and letters claiming paternity or nonsupport. If the accused is in pretrial confinement, trial counsel should inspect the accused's confinement file to discover possible uncharged misconduct committed during confinement.

If trial counsel has thoroughly prepared for trial and has a professional, but aggressive, philosophy about sentencing, the next step is to execute the sentencing strategy by taking full advantage of the substantive law of aggravation evidence.

## IV. PRESENTATION OF THE CASE IN AGGRAVATION

### A. General

When the court returns a finding of not guilty, the accused is acquitted and the proceedings terminate. When the court returns

<sup>29</sup>R.C.M. 1001(b).

<sup>30</sup>R.C.M. 1001(d). See, e.g., *United States v. Owens*, 21 M.J. 117 (C.M.A. 1985). This case sets forth questions that would be good rebuttal by the trial counsel.



a finding of guilty, the court-martial proceeds to the sentencing phase. During the sentencing phase, the trial counsel has the first opportunity to present the "case in aggravation." Then the defense counsel has an opportunity to present a "case in extenuation and mitigation." Thereafter, counsel for both sides present their case in rebuttal and surrebuttal as appropriate. At the conclusion of the evidence and counsel arguments, the military judge announces the sentence (trial by military judge alone); or the military judge instructs the court members who then deliberate, vote, and announce their sentence (trial with court members).

### ***B. Evidence Admitted During the Trial on the Merits***

All evidence admitted during the trial on the merits,<sup>31</sup> and reasonable inferences which can be drawn from that evidence,<sup>32</sup> may be considered by the sentencing authority in arriving at an appropriate sentence. This rule applies to matters which are accepted into evidence for a limited purpose.<sup>33</sup> This prophylactic rule eliminates what otherwise might be an impossible burden on the military judge to issue extensive limiting instructions.

### ***C. Providence Inquiry (Guilty Plea Cases)***

Information elicited from the accused<sup>34</sup> during the military judge's providence inquiry may be argued by the trial counsel and

<sup>31</sup>R.C.M. 1001(f)(2).

<sup>32</sup>United States v. Stevens, 21 M.J. 649 (A.C.M.R. 1985). In *Stevens*, the accused, stationed in Panama, was convicted of larceny of one-half pound of TNT. The accused tried to detonate the TNT by rigging it to a roadside traffic sign and stretching a trip wire across the road. As rigged, the TNT was incapable of detonating. The court held that the trial counsel could argue, and the sentencing authority could consider, that serious injury might have occurred to a passerby if the TNT had exploded as the accused intended. This argument was "illustrative of the outer limits of reasonable inferences to be drawn from the facts" of the case. The court held that it was error for the sentencing authority to consider that "members of the American community in Panama might have assumed that the explosion was the work of terrorists" and "would have been terrified for weeks and maybe for months" by the fear of a mad bomber." This conjecture went beyond the outer limits of reasonable inferences to be drawn from the evidence presented at trial. *Stevens*, 21 M.J. at 652.

<sup>33</sup>R.C.M. 1001(f)(2). For example, a conviction admitted as impeachment pursuant to Mil. R. Evid. 609, or evidence of uncharged misconduct admitted to show motive, opportunity, or intent pursuant to Mil. R. Evid. 404(b), can be considered by the sentencing authority even though they were admitted during the merits for a limited purpose.

<sup>34</sup>United States v. Holt, 22 M.J. 553 (A.C.M.R. 1986); United States v. Arceneaux, 21 M.J. 571 (A.C.M.R. 1985); see also United States v. Gardner, CM 447750 (A.C.M.R. 13 June 1986); United States v. Fuller, SPCM 21945 (A.C.M.R. 13 June 1986). But see United States v. Nellum, 21 M.J. 700 (A.C.M.R. 1985);

can be considered by the military judge in arriving at an appropriate sentence once the guilty plea is accepted as provident.

United States v. Brown, 17 M.J. 987 (A.C.M.R. 1984); United States v. Richardson, 6 M.J. 654 (N.C.M.R. 1978); United States v. Brooks, 43 C.M.R. 817 (A.F.C.M.R. 1971).

Mil. R. Evid. 410 provides:

[E]vidence of the following is not admissible in any court-martial proceeding against the accused who made the plea or was a participant in the plea discussions:

- (1) a plea of guilty which was later withdrawn;
- (2) a plea of nolo contendere;
- (3) any statement made in the course of any judicial inquiry regarding either of the foregoing pleas...

Mil. R. Evid. 410 clearly makes statements made during a providence inquiry inadmissible in subsequent proceedings if the plea of guilty is later withdrawn. Mil. R. Evid. 410 does not clearly address the admissibility of the accused's statements made during a providence inquiry if the plea of guilty is accepted. No military case has expressly used Mil. R. Evid. 410 as the basis for excluding providence inquiry statements from consideration during sentencing.

In *United States v. Richardson*, the Navy Court of Military Review relied on policy considerations to hold that providence inquiry statements could not be considered during sentencing. They reasoned that the providence inquiry required the accused's full cooperation and this full cooperation could be achieved only if there was no risk that the providence inquiry could later be used against the accused. *Richardson*, 6 M.J. at 655.

In *United States v. Holt*, the Army Court of Military Review determined that the policy considerations relied on in *Richardson* were no longer applicable. R.C.M. 910(e) of the 1984 Manual changed prior practice by requiring the accused to testify under oath at the providence inquiry. The Army court concludes that "Because an accused is already subject to further prosecution for giving false information during the providence inquiry, any 'chilling' effect arising from the use of that information during sentencing is *de minimis*." *Holt*, 22 M.J. at 556. The court also relied on federal practice under Fed. R. Evid. 410 and Fed. R. Crim. P. 11 to argue that the military should generally broaden the scope of evidence considered by the sentencing authority.

The better view should be that all statements made during the providence inquiry are privileged except in a subsequent prosecution alleging that the statements were false. Mil. R. Evid. 410 can be interpreted to achieve this result. Mil. R. Evid. 410 excludes from evidence "any statement ... regarding either of the foregoing pleas" (emphasis added). The "foregoing pleas" specified in the rule are a plea of nolo contendere and a plea of guilty. Arguably, the phrase "which was later withdrawn" was not intended to apply to the phrase "foregoing pleas" but was simply intended to make it clear that the sentencing authority can always consider the fact that the accused pled guilty to the offenses for which he or she is being sentenced.

An even stronger argument can be made that the policy considerations relied on in *Richardson* continue to be valid today. In *Holt* the Army court accepts the fact that prior to R.C.M. 910(e) the providence inquiry was justifiably "privileged" because of the need to encourage full and truthful discussion between the accused and the military judge. A "full" discussion is necessary so the military judge can adequately explore the factual basis of the offense and a "truthful" discussion is necessary so the military judge can ascertain whether the plea of guilty is truly voluntary. The Army court's holding in *Holt* substantially compromises both of

Before considering the accused's statements,<sup>35</sup> the military judge must conclude that the statement fits within the scope of permissible aggravation<sup>36</sup> or rebuttal evidence<sup>37</sup> and must deter-

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these objectives. Attempting to justify this compromise based on R.C.M. 910(e) ignores reality.

The following example illustrates this point:

The accused is charged with one sale of a small amount of marijuana to an undercover military policeman and has entered a plea of guilty at a special court-martial. Sentencing will be by court members. During the providence inquiry the accused states that on three prior occasions the policeman came to his barracks room asking for drugs. On the fourth visit the accused finally went to the room across the hall and procured one marijuana cigarette which he sold to the policeman for five dollars. The military judge, concerned that there may be an entrapment defense, decides to explore the accused's predisposition to sell drugs by asking the accused, "Have you ever sold drugs before?" The accused's full and truthful response to that question would be, "Yes, in fact over the last three years I have sold hundreds of pounds of marijuana to soldiers and dependents on this post. The only reason I could not sell marijuana to the policeman on his three prior visits was because my main runner, Private Jones, was apprehended the day before with my monthly supply." Up to this point in time the government has no idea that the accused is a major drug seller.

The Army court is correct in their analysis that R.C.M. 910(e) encourages a full and truthful response to the military judge's question because a false response could conceivably be prosecuted as perjury. If *Holt* is followed the accused's full and truthful response can be considered during sentencing at this court-martial and the accused's statements would be admissible at a new general court-martial where the accused is prosecuted for the drugs found in Private Jones's possession.

If *Richardson* and the proposed interpretation of Mil. R. Evid. 410 are followed the accused's statements will never be disclosed to the sentencing authority and the accused's statements cannot be used at any subsequent court-martial. This "privilege" against subsequent use clearly has substantial impact on the probability that the accused will respond fully and truthfully—not just in this hypothetical, but in any situation where the military judge seeks to explore uncharged misconduct during the providence inquiry.

If full and truthful discussion is actually the objective of the providence inquiry, Mil. R. Evid. 410 should be interpreted to reach that result. There is no indication that the drafters of R.C.M. 910(e) sought to change the way *Richardson* and *Brooks* were already treating information gained during the providence inquiry. There is also no indication that the drafters of the 1984 Manual sought to discard the military's adversarial presentation of evidence, limited by enumerated categories of aggravation evidence and the Military Rules of Evidence, in favor of the more liberal federal sentencing procedures. If the "privilege" is to be discarded some more supportable rationale should be employed. Saying that the "privilege" plays a *de minimis* role in promoting full and truthful discussion because the accused is now placed under oath during the providence inquiry simply defies logic. Interpreting Mil. R. Evid. 410 consistent with *Richardson*, or changing the wording of the rule to more clearly reach that result, would not only promote full and free providence discussions but would also achieve uniformity in the application of the law.

<sup>35</sup>If the guilty plea is withdrawn by the accused or declared improvident by the military judge, any statements the accused made during the providence inquiry are inadmissible at subsequent proceedings. Mil. R. Evid., 410; *United States v. Holt*, 22 M.J. 553 (A.C.M.R. 1986).

<sup>36</sup>See generally R.C.M. 1001(b).

<sup>37</sup>See generally R.C.M. 1001(d).

mine that the evidence should not be excluded under the balancing test of Mil. R. Evid. 403.<sup>38</sup>

In a guilty plea case where sentencing is by court-members, statements made by the accused during the providence inquiry are admissible under the same criteria<sup>39</sup> although there is an additional requirement that the evidence must be in admissible form. Because the court members do not hear the providence inquiry, trial counsel has to use some alternate form of the evidence. Permissible options include a stipulation (with the accused's consent),<sup>40</sup> introduction of relevant portions of the record of trial,<sup>41</sup> or testimony by a witness who heard the providence inquiry.<sup>42</sup> These alternate forms should not be objectionable as hearsay because they will always be admissions of a party opponent<sup>43</sup> and the record of trial qualifies as a public record.<sup>44</sup>

#### *D. Stipulation of Fact (Guilty Plea Cases)*

As a precondition to entering into a pretrial agreement, the government may require the defense to enter into a stipulation of fact.<sup>45</sup> This stipulation normally includes a factual summary of the accused's conduct establishing guilt, but may also properly include aggravating circumstances relating to the accused's offenses.<sup>46</sup>

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<sup>38</sup>Mil. R. Evid. 403 provides "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

<sup>39</sup>United States v. Holt, 22 M.J. 553 (A.C.M.R. 1986). See *supra* note 34.

<sup>40</sup>R.C.M. 811(c). If the accused offers to plead guilty pursuant to a pretrial agreement the government could require as a condition to the pretrial agreement that the accused consent to stipulate to the admissibility of his or her future testimony as it is given at the providence inquiry. R.C.M. 705(c)(2)(A).

<sup>41</sup>Mil. R. Evid. 803(8) (Public records and reports).

<sup>42</sup>Testimony by the trial counsel will generally not be a feasible alternative. See Model Code of Professional Responsibility DR 5-101, DR 5-102, EC 5-9, EC 5-10 (1980).

<sup>43</sup>Admissions by a party-opponent are not hearsay. "Admissions" are broadly defined and include any statement made by a party that is offered against that party. Mil. R. Evid. 801(d)(2).

<sup>44</sup>Mil. R. Evid. 803(8) ("Records . . . in any form, of public office or agencies, setting forth . . . matters observed pursuant to duty imposed by law as to which matters there was a duty to report").

<sup>45</sup>R.C.M. 705(c)(2)(A).

<sup>46</sup>United States v. Silva, 21 M.J. 336 (C.M.A. 1986); United States v. Martin, 20 M.J. 227 (C.M.A. 1985); United States v. Marsh, 19 M.J. 657 (A.C.M.R. 1984) (the government can require the accused to stipulate to matters which are explanatory of the charged offense); United States v. Sharper, 17 M.J. 803 (A.C.M.R. 1984) (where the accused was convicted of wrongfully possessing drug paraphernalia, .44 grams of heroin, 1.0 grams of hashish, and 5.0 grams of marijuana, the

It is not clear whether the government can require the accused to stipulate to other facts in aggravation, such as personnel records, or to matters that the government could only introduce in rebuttal to defense evidence in extenuation and mitigation.<sup>47</sup> It is also unclear to what extent an accused can be compelled to stipulate to matters in aggravation that would otherwise be inadmissible.<sup>48</sup> Until these issues are resolved trial counsel proba-

government could require the accused to stipulate that he intended to distribute the heroin and that when he was apprehended he possessed 1.342 grams of heroin, .84 grams of hashish, 4.83 grams of marijuana, two lockblade knives, and a pocket knife (both with marijuana residue on them), \$284.00, and Deutsch Mark (DM) 680).

<sup>47</sup>United States v. Sharper, 17 M.J. 803 (A.C.M.R. 1984).

[W]e do not hold that an accused may be compelled to stipulate to any other facts in aggravation, such as the existence of personnel records which adversely reflect on his character or military service, or facts the Government would attempt to prove in rebuttal to evidence presented by an accused in extenuation or mitigation. While these issues have not been raised by this case, we have serious doubts about the propriety of such a provision.

Sharper, 17 M.J. at 807.

See also United States v. Garner, ACM 24019 (A.F.C.M.R. 9 Dec. 1983) (it was permissible for trial counsel to put in the stipulation of fact that the accused was denied good conduct medals on two occasions when otherwise eligible).

<sup>48</sup>Compare United States v. Sharper, 17 M.J. 803 (A.C.M.R. 1984); United States v. Keith, 17 M.J. 1078 (A.F.C.M.R. 1984); and United States v. Smith, 9 M.J. 537 (A.C.M.R. 1980); with United States v. Taylor, 21 M.J. 1016 (A.C.M.R. 1986); and United States v. Rasberry, 21 M.J. 656 (A.C.M.R. 1985).

In *Smith*, the defense, pursuant to a pretrial agreement, stipulated that the accused had received nonjudicial punishment on four occasions and had received a letter of reprimand. On appeal the accused, for the first time, challenged the stipulation of fact, arguing that it amounted to a waiver of the right to an independent hearing on the admissibility of the records of nonjudicial punishment and thus violated public policy. The court disagreed. Finding no evidence that the government imposed waiver of a hearing as a precondition to a pretrial agreement, the court held that the accused can voluntarily make such a waiver. The court cautioned that pretrial agreements could not contain conditions which limited the accused's right to contest evidence offered in aggravation. *Smith*, 9 M.J. at 538.

In *Sharper*, the accused was required, pursuant to a pretrial agreement, to stipulate to aggravating circumstances relating to the offenses of which he was found guilty. The court held that the accused could be required to stipulate to aggravation evidence which would otherwise be admissible in presentencing. The court went on to issue the caveat in note 47, *supra*.

*Rasberry* arguably changed the analysis used in both *Smith* and *Sharper*. In *Rasberry*, the defense moved to excise statements concerning aggravation evidence in the stipulation of fact, alleging that they were obtained in violation of the accused's Article 31 rights against self-incrimination. The military judge ruled that he would not litigate the motion and would not require the Government to excise the statements. The defense could either stipulate, and obtain the benefit of the pretrial agreement, or refuse to stipulate, and thus cancel the agreement. The Army Court of Military Review upheld the trial judge's ruling citing a number of independent grounds for their decision. Although the precise holding of the case is unclear, the decision can be read to sanction the practice of forcing the defense to stipulate to otherwise inadmissible aggravation evidence in return for a pretrial

bly should not create unnecessary appellate issues by putting clearly inadmissible matters in the stipulation of fact.

The stipulation of fact may properly contain uncharged misconduct which would have been admissible for only a limited purpose during the case-in-chief so long as the evidence is relevant to sentencing and the relevance is not outweighed by unfair prejudice to the accused.<sup>49</sup>

agreement. This reading of *Rasberry* was strongly endorsed by the Army court in *Taylor*.

In *Taylor*, the trial judge excised inadmissible uncharged misconduct from the stipulation of fact offered by the trial counsel pursuant to the accused's pretrial agreement. The Army Court of Military Review held that the trial judge impermissibly injected himself into the pretrial agreement negotiations. The burden is on the parties to reach an agreement. If the accused doesn't want to stipulate, the government doesn't have to enter into a pretrial agreement. The only time the trial judge should intervene is when the "contents of the stipulation are determined to reach the level of plain error." *Taylor*, 21 M.J. at 1018.

*Keith* and *Sharper* properly represent the better view. In *Sharper*, the court directly commented on the authority of the military judge to police the terms of the pretrial agreement. While the case stops short of setting out a methodology for trial judges to follow in handling inadmissible evidence contained in a stipulation of fact, it does reiterate that the military judge has the power to modify a pretrial agreement by judicial order.

*United States v. Keith* set out guidance on how military defense counsel should handle government demands that the accused stipulate to inadmissible aggravation evidence. "[W]e recommend that trial defense counsel enter into the stipulation of fact, if true, and raise the issue of any inadmissible matters contained therein at trial for resolution by the military judge on the record." *Keith*, 17 M.J. at 1080. The military judge should excise inadmissible matters and should judicially enforce the pretrial agreement. Although the Court of Military Appeals has not directly ruled on this issue they have decided a couple of recent cases involving the admissibility of matters contained in the stipulation of fact in guilty plea cases. In both instances they determined the admissibility issue without relying on any prophylactic "take-it-or-leave-it" approach to the stipulation of fact. See generally *United States v. Silva*, 21 M.J. 336 (C.M.A. 1986); *United States v. Martin*, 20 M.J. 227 (C.M.A. 1985).

"Uncharged misconduct presented during the merits of a contested case pursuant to Mil. R. Evid. 404(b) to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake can be considered by the sentencing authority in determining an appropriate sentence after the accused is convicted.

If the accused pleads guilty to charged offenses uncharged misconduct is not automatically admissible merely because it would have been admissible during the case-in-chief. *United States v. Silva*, 21 M.J. 336 (C.M.A. 1986); *United States v. Martin*, 20 M.J. 227 (C.M.A. 1985).

Uncharged misconduct is inadmissible during presentencing proceedings if the only purpose the evidence serves is to show that the accused is a bad person. See *United States v. Gambini*, 13 M.J. 423 (C.M.A. 1982); *United States v. Harrod*, 20 M.J. 777 (A.C.M.R. 1985); *United States v. Silva*, 19 M.J. 501 (A.F.C.M.R. 1984); *United States v. Keith*, 17 M.J. 1078 (A.F.C.M.R. 1984); *United States v. Taliaferro*, 2 M.J. 397 (A.C.M.R. 1975); *United States v. Potter*, 46 C.M.R. 529 (N.C.M.R. 1972); accord R.C.M. 1001(b)(4) analysis. Instead, evidence of uncharged misconduct offered for the first time during presentencing is admissible if: it is in a form admissible under the Military Rules of Evidence; it falls within the definition of "aggravation evidence" in R.C.M. 1001(b)(4); and the probative value



## *E. Specific Categories of Aggravation Evidence*

### *1. General.*

The trial counsel's case in aggravation consists of matters which the sentencing authority may consider in arriving at an appropriate sentence. These matters can be presented by the trial counsel, and can be considered by the sentencing authority, regardless of what the defense counsel decides to present during the case in extenuation and mitigation.<sup>50</sup> The government's right to present presentencing evidence is the same in a contested case as it is in a guilty plea case.<sup>51</sup>

of the evidence outweighs its prejudicial effect under the Mil. R. Evid. 403 balancing test. Motive or state of mind can be admissible during presentencing because it is a circumstance directly relating to the offense *not* because it falls within Mil. R. Evid. 404(b).

Uncharged misconduct which falls within R.C.M. 1001(b)(4) necessarily must satisfy Mil. R. Evid. 404(b) because it is being offered for a purpose other than "to prove the character of a person in order to show that the person acted in conformity therewith." The evidence is being offered as a circumstance directly relating to the charged offense or a repercussion of the charged offense and is thus relevant to deciding an appropriate sentence.

*Martin* and *Harrod* provide some examples how Mil. R. Evid. 404(b) type evidence can be used in aggravation. In *Martin*, Chief Judge Everett suggests that "in a drug-distribution case, it will help the sentencing authority to learn whether the accused distributed the drug to a friend as a favor or whether he did so as part of a large business that he operated." *Martin*, 20 M.J. at 232 (Everett, J., concurring). Uncharged drug offenses which would have been admissible on the merits for the limited purpose of showing motive are admissible for the first time on sentencing in a guilty plea case because motive is a circumstance directly relating to the offense and because the probative value of motive in proving a relevant sentencing consideration (such as rehabilitative potential) outweighs prejudice to the accused (the risk that the sentencing authority will punish the accused for the uncharged misconduct).

In *Harrod*, the accused pled guilty to wrongful possession of marijuana with intent to distribute and wrongful possession of drug paraphernalia. During sentencing the trial counsel offered evidence (1) that the accused was constantly smoking marijuana in his off-post apartment—often with other soldiers from the unit; (2) the marijuana the accused possessed on the date of the offense was part of a larger amount which he was in the process of selling; and (3) the accused had previously purchased marijuana from local civilians. The Army court held that this evidence of uncharged misconduct was not admissible to show that the accused deserved harsh punishment as a repeat offender but was admissible to show the accused's motive for possessing the drugs and the drug paraphernalia, the accused's guilty knowledge regarding his wrongful possession, and the accused's criminal intent. The uncharged misconduct involved circumstances directly relating to the charged offenses and satisfied the balancing test of Mil. R. Evid. 403.

<sup>50</sup>See generally R.C.M. 1001.

<sup>51</sup>*United States v. Vickers*, 13 M.J. 403 (C.M.A. 1982). In *Vickers* the accused was convicted, in a contested case, of disobeying a commissioned officer's order to leave the scene of a disturbance. During presentencing the trial counsel introduced aggravation evidence that the accused's disobedience actually agitated the disturbance and caused the company commander to lose control of the situation. On appeal the defense urged that aggravation evidence was admissible only in guilty plea cases. The defense argument relied in part on the fact that para. 75,

The military relies on an adversarial presentation of evidence to the sentencing authority. Although some judges<sup>52</sup> and commentators<sup>53</sup> analogize military sentencing evidence to the federal presentencing report,<sup>54</sup> such generalizations are not generally useful. The Manual for Courts-Martial expressly limits the type of sentencing evidence which can be presented by the government.<sup>55</sup> The case in aggravation consists of five enumerated categories of information:

- (i) service data relating to the accused taken from the charge sheet;
- (ii) personal data relating to the accused and of the character of the accused's prior service as reflected in the personnel records of the accused;
- (iii) evidence of prior convictions, military or civilian;
- (iv) evidence of aggravation; and
- (v) evidence of rehabilitative potential.<sup>56</sup>

All evidence offered by the trial counsel during the case in aggravation must be "pigeonholed" into one of the five enumerated categories.

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MCM, 1969, did not expressly authorize aggravation evidence in contested cases but did contain a provision authorizing aggravation evidence after a finding of guilty based upon a plea of guilty.

The court held that "regardless of the plea, the prosecution after findings of guilty may present evidence which is directly related to the offense for which an accused is to be sentenced so that the circumstances surrounding that offense or its repercussions may be understood by the sentencing authority." *Vickers*, 13 M.J. at 406.

Although R.C.M. 1001 resolves the issue by expressly authorizing the presentation of aggravation evidence after any "findings of guilty," *Vickers* can be interpreted broadly to stand for the proposition that the scope of admissible aggravation evidence is the same in both contested cases and guilty plea cases.

"See, e.g., *United States v. Holt*, 22 M.J. 553 (A.C.M.R. 1986); *United States v. Hanes*, 21 M.J. 647 (A.C.M.R. 1985); *United States v. Harrod*, 20 M.J. 777 (A.C.M.R. 1985). In *Harrod*, the Army Court of Military Review outlined its liberal sentencing philosophy as follows:

[I]t is clear that in promulgating the . . . 1984 Manual . . . the President intended to greatly expand the types of information that could be presented to a court-martial during the adversarial presentencing proceeding . . . [W]e believe that military judges and court members are intended to have access to substantially the same amount of aggravating evidence during the presentencing procedure as is available to federal district judges in presentencing reports.

*Harrod*, 20 M.J. at 779.

"See, e.g., R.C.M. 1001 analysis (the presentencing provisions are intended to permit "the presentation of much of the same information to the court-martial as would be contained in a presentence report, but it does so within the protections of an adversarial proceeding").

"See generally Fed. R. Crim. P. 32(c).

"R.C.M. 1001.

"R.C.M. 1001(a)(1)(A).



These categories are further defined by the Manual,<sup>57</sup> department regulations,<sup>58</sup> and case law. Evidence offered from each of these categories must also be admissible under the Military Rules of Evidence.<sup>59</sup> Despite some dicta in case law to the contrary,<sup>60</sup> the Military Rules of Evidence are *not* relaxed for the government during the case in aggravation.<sup>61</sup>

## 2. Data from the charge sheet.

As a preliminary matter on sentencing the trial counsel provides the sentencing authority with the personal data on the charge sheet<sup>62</sup> concerning the accused's age, pay, time in service, and prior restraint.<sup>63</sup> The trial counsel should verify the accuracy of the data with a defense counsel.<sup>64</sup> While the normal practice is for trial counsel to read this data into the record,<sup>65</sup> a data sheet is also acceptable.<sup>66</sup>

## 3. Previous convictions.

During the case in aggravation the trial counsel may present evidence of the accused's prior military or civilian convictions.<sup>67</sup> Convictions already received into evidence as impeachment during the trial on the merits can be considered during sentencing

<sup>57</sup>See generally R.C.M. 1001(b).

<sup>58</sup>See generally AR 27-10, para. 5-25.

<sup>59</sup>Mil. R. Evid. 1101(a).

<sup>60</sup>See, e.g., *United States v. Martin*, 20 M.J. 227 (C.M.A. 1985).

<sup>61</sup>Mil. R. Evid. 1101(c) provides that the rules of evidence may be relaxed pursuant to R.C.M. 1001. R.C.M. 1001(c)(3) provides that the "military judge may, with respect to matters in extenuation or mitigation or both, relax the rules of evidence" (emphasis supplied). R.C.M. 1001(d) provides that if the rules of evidence are relaxed for the defense during the case in extenuation or mitigation, then the rules may be relaxed to the same degree during the prosecution case in rebuttal. Nowhere does R.C.M. 1001 authorize relaxation of the rules of evidence during the government case in aggravation.

<sup>62</sup>DD Form 458; MCM, 1984, App. 4.

<sup>63</sup>R.C.M. 1001(b)(1). Although the 1984 Manual lists the accused's age as one of the items from the charge sheet which trial counsel should present to the court-martial, the current charge sheet, DD Form 458 (Aug. 1984), contains no entries concerning the accused's age or date of birth. See MCM, 1984, App. 4.

<sup>64</sup>The defense counsel may object to data which is materially inaccurate or incomplete. R.C.M. 1001(b)(1).

<sup>65</sup>Dep't of Army, Pamphlet No. 27-9, *Military Judges' Benchbook*, para. 2-34 (May 1982) (C1, 15 Feb. 1985) [hereinafter *Benchbook*].

<sup>66</sup>R.C.M. 1001(b)(1) (the trial counsel, at the judge's discretion, may provide the data in the form of a written statement).

<sup>67</sup>R.C.M. 1001(b)(3)(A); *United States v. Cook*, 10 M.J. 138 (C.M.A. 1981). A vacation of a suspension of a court sentence is not a "conviction" under the rule. *United States v. Holloway*, CM 443289 (A.C.M.R. 7 June 1983). Evidence that the accused "pled guilty to theft in a state court" does not constitute a conviction. *United States v. Calin*, 11 M.J. 722 (A.F.C.M.R. 1981).

without being re-introduced after findings.<sup>68</sup> Convictions may be proven by any evidence admissible under the Military Rules of Evidence<sup>69</sup> to include direct testimony by a witness with firsthand knowledge about the conviction;<sup>70</sup> DA Form 2-2 (Record of Court-Martial Conviction);<sup>71</sup> DD Form 493 (Extract of Military Records of Previous Convictions);<sup>72</sup> the court-martial promulgating order;<sup>73</sup> the actual record of trial;<sup>74</sup> or any other method permissible under the Military Rules of Evidence. Documentary evidence used to prove a conviction must be properly authenticated.<sup>75</sup>

Courts-martial result in a "conviction" once sentence is adjudged in the case.<sup>76</sup> To determine whether a civilian adjudication has resulted in a criminal "conviction" counsel should refer to the law of the civilian jurisdiction where the proceeding took place.<sup>77</sup>

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<sup>68</sup>R.C.M. 1001(f)(2). For foundational elements necessary to admit prior convictions of the accused as impeachment see Mil. R. Evid. 609.

<sup>69</sup>R.C.M. 1001(b)(3)(C).

<sup>70</sup>*Id.*

<sup>71</sup>See, e.g., *United States v. Lemieux*, 13 M.J. 969 (A.C.M.R. 1982).

<sup>72</sup>R.C.M. 1001(b)(3)(C) discussion; *United States v. Lemieux*, 13 M.J. 969 (A.C.M.R. 1982).

<sup>73</sup>*United States v. Hines*, 1 M.J. 623 (A.C.M.R. 1975).

<sup>74</sup>*United States v. Wright*, 20 M.J. 518 (A.C.M.R. 1985) (a record of trial can be used to prove a conviction so long as only relevant portions are considered and the probative value outweighs any prejudicial effect). See also *United States v. Decker*, CM 444320 (A.C.M.R. 5 Oct. 1984) (It was error for the trial judge to admit extraneous materials which accompanied the government's proof of a civilian conviction. The record of conviction impermissibly contained a case chronology showing that bench warrants had been issued after the accused failed to appear and the accused had plea bargained to have additional charges dismissed).

<sup>75</sup>See generally Mil. R. Evid. sec. IX. Although the document used to prove the conviction must be properly authenticated, collateral documents used to establish an evidentiary foundation do not have to be authenticated. See Mil. R. Evid. 104(a); *United States v. Yanez*, 16 M.J. 782 (A.C.M.R. 1983) (unauthenticated record of trial can be used to establish *Booker* compliance as an evidentiary foundation to admissibility of a summary court-martial conviction).

<sup>76</sup>R.C.M. 1001(b)(3)(A).

<sup>77</sup>R.C.M. 1001(b)(3) analysis. See, e.g., *United States v. Cook*, 10 M.J. 138 (C.M.A. 1981). In *Cook*, the trial counsel introduced aggravation evidence that the accused pled guilty (to loitering and marijuana possession) in a Florida court. The court withheld adjudication of guilt and imposition of sentence, giving the accused one year of probation. This evidence was admissible at court-martial as a prior conviction because Florida law considered the defendant "convicted" upon entry of a guilty plea.

This analysis was taken one step further in *United States v. Slovacek*, 21 M.J. 538 (A.F.C.M.R. 1985). In *Slovacek*, the court admitted an Ohio juvenile adjudication as a prior conviction even though it was not a "conviction" under Ohio law. The court, noting the general philosophy that "the sentencing authority should be given as much relevant information as is available," admitted the juvenile adjudication because it was the functional equivalent of a conviction, there was no Manual provision expressly prohibiting admission, and the Ohio courts would have considered the adjudication as sentencing evidence in an Ohio criminal trial. *Slovacek*, 21 M.J. at 540.

To be admissible, the conviction must occur before commencement of the presentencing proceeding in which it is offered.<sup>78</sup> Except for summary court-martial convictions,<sup>79</sup> there is no requirement that a conviction be "final" to be admissible.<sup>80</sup> If a conviction is pending appellate review that fact may be brought out by the defense as a factor affecting the weight to be attributed to the conviction.<sup>81</sup>

When offered as aggravation evidence<sup>82</sup> summary court-martial convictions must be "final"<sup>83</sup> and must meet "*Booker* requirements."<sup>84</sup> The record of a summary court-martial conviction must be finally reviewed to be "final."<sup>85</sup> A summary court-martial is finally reviewed when reviewed by a judge advocate pursuant to

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Documentary evidence which shows that the accused pled guilty to civilian felony charges is not admissible as a "conviction" absent some indication that the court rendered findings and sentence on the charges. *United States v. May*, 18 M.J. 839 (N.M.C.M.R. 1984).

"Convictions are admissible under R.C.M. 1001(b)(3)(A) even though the offenses contained therein were committed at dates later than the offenses charged at trial. The courts liberally construe the term "prior convictions" because of the President's general intent to expand military sentencing evidence to include matters contained in the federal presentence report. *United States v. Hanes*, 21 M.J. 647 (A.C.M.R. 1985); *United States v. Allen*, 21 M.J. 507 (A.F.C.M.R. 1985). This represents a change from the 1969 Manual which only admitted convictions "for offenses committed during the six years next preceding the commission of any offense of which the accused has been found guilty." MCM, 1969, para. 75b(3)(b).

"R.C.M. 1001(b)(3)(B).

"*Id.* This represents a change from the 1969 Manual which required all convictions to be final before they could be admitted during sentencing. MCM, 1969, para. 75b(3)(b).

"*Id.*

"Distinguish the admissibility of a summary court-martial conviction as aggravation from the admissibility of summary court-martial convictions to invoke the escalator clause in the habitual offender provisions of R.C.M. 1003(d); or to impeach the accused under Mil. R. Evid. 609. See generally *United States v. Cofield*, 11 M.J. 422 (C.M.A. 1981); *United States v. Mack*, 9 M.J. 300 (C.M.A. 1980); *United States v. Booker*, 5 M.J. 238 (C.M.A. 1978).

A summary court-martial is generally an informal, nonadversarial proceeding concerning relatively minor offenses. As such, adjudications of guilt by a summary court-martial do not rise to the level of a "criminal conviction" for purposes of impeachment (Mil. R. Evid. 609) or sentence escalation (R.C.M. 1003) unless the accused was represented by defense counsel or affirmatively waived the right to be represented by counsel. Accepting trial by summary court-martial after being told counsel for representation would not be provided does not constitute waiver of the right to counsel. *United States v. Rogers*, 17 M.J. 990 (A.C.M.R. 1984).

"R.C.M. 1001(b)(3)(B).

"*United States v. Booker*, 5 M.J. 238 (C.M.A. 1978). If a summary court-martial conviction fails to meet *Booker* requirements it is not admissible as a prior conviction and is not otherwise admissible as "mere evidence of prior duty performance." *United States v. Herbin*, SPCM 19484 (A.C.M.R. 26 Jan. 1984).

"R.C.M. 1001(b)(3)(B).

R.C.M. 1112.<sup>86</sup> If a promulgating order is used to prove a summary court-martial conviction the document itself may or may not contain any entry indicating a final review by a judge advocate.<sup>87</sup> Even when finality is not apparent on the face of the document, the court will presume finality if sufficient time has elapsed since the conviction such that review would ordinarily have been completed.<sup>88</sup> This presumption may be overcome if there is conflicting evidence indicating that final review may not have been completed.<sup>89</sup> Where such a conflict occurs, the court must resolve the factual issue based on all the evidence available.<sup>90</sup>

"Booker requirements" are satisfied if the accused voluntarily consented to trial by summary court-martial *and* the accused was afforded the opportunity to consult with counsel regarding the right to demand trial by special court-martial.<sup>91</sup> If the documen-

"R.C.M. 1001(b)(3)(B) indicates that review must be completed under "Article 65(c)." Because Article 65(c) was deleted from the UCMJ when the Military Justice Act of 1983 went into effect the drafters probably intended for summary court-martial convictions to become final after review by a judge advocate pursuant to UCMJ art. 64(a) and R.C.M. 1112.

"The copy of the promulgating order contained in the accused's personnel file may or may not contain the judge advocate's 'legally sufficient, mighty fine trial (LSMFT)' stamp.

"United States v. Graham, 1 M.J. 308 (C.M.A. 1976) (the promulgating order was five years old); *see also* United States v. Hines, 1 M.J. 623 (A.C.M.R. 1975) (eight months was enough time lapse to constitute prima facie showing of final review for a special court-martial).

"*See, e.g.,* United States v. Reed, 1 M.J. 166 (C.M.A. 1975) (absence of supervisory review entry on DA Form 20B overcame the promulgating order's prima facie showing of finality); United States v. Hancock, 12 M.J. 685 (A.C.M.R. 1981) (absence of supervisory review entry on DA Form 2-2 overcame promulgating order's presumption of finality).

"*See, e.g.,* United States v. Lemieux, 13 M.J. 969 (A.C.M.R. 1982) (Although the DD Form 493 had an entry showing that the conviction was final, the DA Form 2-2, from which the DD Form 493 was supposed to be prepared, did not have an entry showing review had been completed. The DA Form 2-2 was thus held to be controlling).

"United States v. Booker, 5 M.J. 238 (C.M.A. 1978) (*Booker* only applies to summary court-martial convictions after 11 October 1977); United States v. Syro, 7 M.J. 431 (C.M.A. 1979) (*Booker* applies to records of summary court-martial introduced as personnel records reflecting past conduct and performances for purpose of aggravation).

The case of *United States v. Booker* followed a series of Supreme Court cases dealing with imposition of prison sentences in proceedings where the accused was not represented by counsel. *See, e.g.,* *Middendorf v. Henry*, 425 U.S. 25 (1976); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963). In *Middendorf*, the Supreme Court held that failure to provide counsel for an accused at a summary court-martial abridges neither the fifth nor the sixth amendments. Nevertheless, the Court of Military Appeals imposed the *Booker* requirements as a military due process guarantee. The right to consult with counsel probably is not constitutionally required and is judicially imposed as a matter of policy to effectuate the accused's statutory right to turn down trial by summary court-martial.

tary evidence used to prove the conviction is annotated with an entry indicating that the accused was afforded the opportunity to consult with counsel and was afforded the opportunity to demand trial by special court-martial, the document establishes a *prima facie* showing of compliance with *Booker*.<sup>92</sup>

If the record of conviction does not establish these foundational requirements the trial counsel must cure the defect with live testimony or supplementary documents which demonstrate that the accused was afforded these rights.<sup>93</sup> The military judge may not conduct an inquiry of the accused to establish admissibility.<sup>94</sup>

<sup>92</sup>Prior to 1 August 1984 DD Form 458, Charge Sheet, was used to record summary courts-martial proceedings. Since 1 August 1984 a new document, DD Form 2329, Record of Trial By Summary Court-Martial, has been used to document summary courts-martial (MCM, 1984, app. 15). Neither form contains any entry indicating whether the accused had an opportunity to consult with counsel. Some jurisdictions modified the charge sheet by adding a statement asserting that the accused was afforded an opportunity to consult with counsel before electing trial by summary court-martial. Other jurisdictions solved the problem by locally drafting a rights advice form to attach to records of summary court-martial conviction. Since 1 November 1982 Army regulations require DA Form 5111-R, Summary Court-Martial Rights Notification/Waiver Statement, to be attached to records of summary courts-martial. AR 27-10, para. 5-21. When properly completed DA Form 5111-R fully satisfies all *Booker* requirements.

<sup>93</sup>*United States v. Alsop*, 17 M.J. 166 (C.M.A. 1984); *United States v. Kuehl*, 11 M.J. 126 (C.M.A. 1981); *United States v. Yanez*, 16 M.J. 782 (A.C.M.R. 1983). In *Kuehl*, the trial counsel introduced a record of trial by summary court-martial. Although the record of trial itself did not establish the *Booker* requirements, attached to the record of trial was a rights advisement form signed by the accused. The form stated that "before deciding whether to consent or object to trial by Summary Court-Martial, I have the right to consult with independent legal counsel, and that the United States will provide a military lawyer for such consultation at no expense to me." This supplemental rights form was sufficient to establish *Booker* compliance.

In *Alsop*, the accused was given the opportunity to be represented by counsel at the summary court-martial but was not separately advised of the right to consult with counsel. The accused waived representation, but if the accused would have exercised the right he necessarily would have consulted with counsel before being forced to elect trial by summary court-martial. Under these circumstances *Booker* requirements were satisfied.

In *Yanez* the trial counsel introduced a summary court-martial promulgating order and an unauthenticated record of trial by summary court-martial, page 4 of DD Form 498. The record of trial contained evidence of *Booker* compliance. The court held *Booker* requirements are a foundation issue. Under Mil. R. Evid. 104 the trial judge is not bound by the rules of evidence when determining preliminary questions such as the foundation for the admissibility of evidence. The trial judge could properly consider an unauthenticated document to decide whether *Booker* requirements had been satisfied.

<sup>94</sup>*United States v. Sauer*, 15 M.J. 113 (C.M.A. 1983). Prior to 1983 there were a number of military cases that allowed the military judge to question the accused during the sentencing phase of the trial to gather information establishing the admissibility of documentary evidence. *United States v. Spivey*, 10 M.J. 7 (C.M.A. 1980); *United States v. Mathews*, 6 M.J. 357 (C.M.A. 1978). In *Sauer*, the Court of Military Appeals expressly reversed this line of cases based on the Supreme Court decision in *Estelle v. Smith*, 451 U.S. 454 (1981).

Defense counsel's failure to object at trial to summary court-martial convictions will normally waive any *Booker* issues.<sup>95</sup>

*4. Personnel records reflecting the past military efficiency, conduct, performance, and history of the accused.*

The admissibility of personnel records should be analyzed using the same three-step methodology generally applicable to the admission of other aggravation evidence.<sup>96</sup> First, the evidence must fit within one of the five categories of aggravation evidence enumerated in R.C.M. 1001(b). Second, the document must be in a form admissible under the military rules of evidence. Third, the evidence must meet the Mil. R. Evid. 403 balancing test.

R.C.M. 1001(b)(2) authorizes the admission of personnel records as aggravation evidence if (1) they are offered in documentary form;<sup>97</sup> (2) they reflect the past military efficiency, conduct, performance, or history of the accused,<sup>98</sup> and (3) they are prepared and maintained in accordance with service regulations.<sup>99</sup>

Although the rule specifies "personnel records," documents do not have to actually be maintained in a personnel file to be admissible as aggravation.<sup>100</sup> The service secretaries have the

<sup>95</sup>United States v. Smith, CM 447229 (A.C.M.R. 18 Oct. 1985); United States v. Williams, CM 446831 (A.C.M.R. 7 June 1985); United States v. Hunt, SPCM 18639 (A.C.M.R. 22 June 1983); United States v. Taylor, 12 M.J. 561 (A.C.M.R. 1981) (where defense counsel did not object to the record of summary court-martial conviction when it was offered at trial and trial counsel may have been able to establish *Booker* compliance, failure to raise the issue at trial constituted waiver). Cf. United States v. Munn, ACM S26022 (A.F.C.M.R. 30 Nov. 1983) (plain error to admit a civilian conviction for an offense which occurred after the date of the offense charged at the court-martial—in violation of MCM, 1969, para. 75b(3)).

<sup>96</sup>See *infra* notes 166-69 and accompanying text.

<sup>97</sup>R.C.M. 1001(b)(2) provides that the "trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's marital status; number of dependents, if any; and character of prior service" (emphasis added).

<sup>98</sup>R.C.M. 1001(b)(2) defines "personnel records of the accused" as "all those records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused."

<sup>99</sup>*Id.*; see also AR 27-10, para. 5-25.

<sup>100</sup>R.C.M. 1001(b)(2); AR 27-10, para. 5-25; see, e.g., United States v. Green, 21 M.J. 633 (A.C.M.R. 1985) (finance records admissible); United States v. Perry, 20 M.J. 1026 (A.C.M.R. 1985) (confinement file document admissible).

But see United States v. Lund, 7 M.J. 903 (A.F.C.M.R. 1979); United States v. Newbill, 4 M.J. 541 (A.F.C.M.R. 1977). In *Lund*, the trial counsel introduced a letter which the accused's unit commander received from a noncommissioned officer. The letter alleged that the accused had been involved in misconduct and recommended action be taken against the accused. Although this letter was properly maintained in the records of the unit orderly room the Air Force Court of Military Review held that it should have been excluded from evidence. Without further analysis the court held that just because the letter was contained in an authorized file it was not necessarily a "personnel record" within the meaning and intent of para. 75d, MCM, 1969.



authority to determine which personnel records are admissible.<sup>101</sup> Army Regulation 27-10 provides the following guidance for Army courts-martial:

*Personal data and character of prior service of the accused.*

Trial counsel may, in his or her discretion, present to the military judge (for use by the court-martial members or military judge sitting alone) copies of any personnel records that reflect the past conduct and performance of the accused, made or maintained according to departmental regulations. Examples of personnel records that may be presented include—

- (1) DA Form 2 (Personnel Qualification Record—Part 1) and DA Form 2-1 (Personnel Qualification Record—Part 2).
- (2) Promotion, assignment, and qualification orders, if material.
- (3) Award orders and other citations and commendations.
- (4) Except for summarized records of proceedings under Article 15 (DA Form 2627-1), records of punishment under Article 15, UCMJ, from any file in which the record is properly maintained by regulation.
- (5) Written reprimands or admonitions required by regulation to be maintained in the MPRJ or OMPF of the accused.
- (6) Reductions for inefficiency or misconduct.
- (7) Bars to reenlistment.
- (8) Evidence of civilian convictions entered in official military files.
- (9) Officer and enlisted efficiency reports.
- (10) DA Form 3180 (Personnel Screening and Evaluation Record).

These records may include personnel records contained in the OMPF or located elsewhere, unless prohibited by law

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In *Newbill*, the court held that an administrative discharge board packet was not a "personnel record" contemplated by Air Force regulations.

<sup>101</sup> R.C.M. 1001(b)(2).

or other regulation.<sup>102</sup> Such records may not, however, include DA Form 2627-1 (Summarized Record of Proceedings Under Article 15, UCMJ).<sup>103</sup>

Prudent trial counsel should do a complete review of *all* documents contained in the accused's personnel files and should not limit their investigation to the documents enumerated in AR 27-10. "Other documents" not listed in AR 27-10 may be admissible in aggravation if they reflect the character of the accused's prior service and otherwise meet evidentiary foundation requirements.<sup>104</sup> Documents which are not admissible in aggravation, such as records of summarized Article 15 or the accused's enlistment forms,<sup>105</sup> may nevertheless be a valuable source of

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<sup>102</sup>The intent of the Army regulation is to be liberal in admitting personnel documents during sentencing. There is no specific limit as to the source of the record ("or located elsewhere"). The Army Court of Military Review has been liberal in interpreting this provision—for example in holding that documents contained in the restrictive fiche of the OMPF are admissible during sentencing. In *United States v. Pace*, CM 446150 (A.C.M.R. 28 June 1985) and *United States v. Taylor*, SPCM 19179 (A.C.M.R. 30 Jan. 1984) the court reasoned that the purpose of the restrictive fiche is to protect the soldier against adverse effects on favorable personnel actions at Department of the Army level. When a record, such as a record of nonjudicial punishment, is filed in the restrictive fiche *and* in the local unit file there is a regulatory intent that the document be available for future use in adverse disciplinary proceedings at unit level.

If a conflicting regulation makes a personnel document "confidential" by specifically restricting its use the document is not admissible as aggravation evidence. *United States v. Cottle*, 11 M.J. 572 (A.F.C.M.R. 1981) (information which is confidential under applicable drug abuse regulations cannot be admitted as aggravation evidence); *United States v. Cruzado-Rodriguez*, 9 M.J. 908 (A.F.C.M.R. 1980) (Air Force Form 1612, Notification of Drug-Abuse Information, showing that the accused entered a drug-abuse prevention program should not have been admitted on sentencing because of the confidentiality provisions of Dep't of Air Force, Reg. No. 30-2, Social Action Programs, para. IIb (8 Nov. 1976)).

<sup>103</sup>AR 27-10, para. 5-25.

<sup>104</sup>See, e.g., *United States v. Haslam*, CM 446000 (A.C.M.R. 26 Nov. 1984) (documents reflecting the accused's removal from the Personnel Reliability Program for recurrent use of marijuana are admissible as "other personnel documents").

<sup>105</sup>Summarized Article 15 records are the only personnel documents specifically excluded by Army regulation. AR 27-10, para. 5-25; *United States v. Carmack*, SPCM 21072 (A.C.M.R. 18 June 1985).

Enlistment forms are not admissible as personnel documents because they don't reflect past *military* efficiency, conduct, performance, or history of the accused. *United States v. Peyton*, SPCM 19880 (A.C.M.R. 31 July 1984) (DD Form 1966/2-8 extract of Army Enlistment Application, which contained entries concerning the accused's preservice experimentation with marijuana and resulting discharge from the Air Force Delayed Entry Program was inadmissible as aggravation evidence); *United States v. Honeycutt*, 6 M.J. 751 (N.C.M.R. 1978) (a page from the accused's enlistment application showing that the accused was fined \$50.00 for possession of marijuana while a juvenile was not admissible); *United States v. Martin*, 5 M.J. 888 (N.C.M.R. 1978) (enlistment records showing an enlistment waiver because of preservice drug use were not admissible); *United States v.*



information and may contain information useful during the government case in rebuttal.<sup>106</sup>

Because "personnel records" are not limited to documents contained in files officially designated as "personnel files" counsel should also examine other files such as the accused's finance records,<sup>107</sup> reenlistment records,<sup>108</sup> and confinement records.<sup>109</sup>

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Galloway, NCMC 76 1677 (N.C.M.R. 14 Sept. 1976) (enlistment records showing an enlistment waiver because of preservice juvenile adjudications were not admissible because they didn't reflect past military behavior).

In *Galloway* the court provided the following rationale for the military service limitation on the admissibility of personnel records:

We also consider it appropriate that past derelictions, especially juvenile offenses, should not follow a member into military service. Once a member qualifies for entry, his past misdeeds should not be held against him and he should be able to start off with a clear slate. Unless . . . the circumstances constitute a proper matter of rebuttal, the conditions of enlistment would not appear to be relevant in a court-martial proceeding.

*Galloway*, slip op. at 3. The Navy cases may change as a result of the new Navy JAGMAN, Dep't of Navy, JAGNOTE 5,800 JAG:204, para. 0133 (17 July 1984).

<sup>106</sup>Documents which are not admissible because they are defective or improperly maintained should also be obtained from the files in case the opportunity to use them as impeachment or rebuttal arises during the course of trial.

For a good example of how personnel documents can be effectively used for impeachment see *United States v. Owens*, 21 M.J. 117 (C.M.A. 1985) (trial counsel could impeach the accused's sworn testimony on the merits by cross-examining the accused about omissions from his sworn warrant officer application form).

For a good example of how otherwise inadmissible documents can become admissible in rebuttal see *United States v. Strong*, 17 M.J. 263 (C.M.A. 1984). In *Strong* a record of nonjudicial punishment that was inadmissible during aggravation because it was over two years old (in contravention of applicable Air Force regulations) nevertheless became admissible in rebuttal once the defense introduced evidence that he had received a good conduct medal and an honorable discharge during a prior enlistment. Although it is not entirely clear when the defense has opened the door to such rebuttal it is clearly admissible when the defense puts on directly contradictory testimony, e.g., the accused's testimony "I've never received an Article 15" opens the door for the trial counsel to introduce evidence of an otherwise inadmissible Article 15. The defense cannot use the rules of evidence as a sword to put on false evidence. In *Strong* the court went further and admitted the nonjudicial punishment to rebut inferences created by the defense evidence. The defense evidence about receiving a good conduct medal and an honorable discharge during a prior enlistment created the impression that the accused's prior term of service was flawless. Evidence that the accused also received nonjudicial punishment during the prior enlistment was admitted to rebut this inference. *But see United States v. Strong*, 17 M.J. 263, 267 (C.M.A. 1984) (Everett, C.J., dissenting) (rebuttal by otherwise inadmissible nonjudicial punishment should be permitted only when the accused has falsely testified). *See also United States v. Irvin*, NCMC 84 3149 (N.M.C.M.R. 30 Oct. 1984) (trial counsel rebuttal could properly include references to nonjudicial punishment which failed to comply with the requirements of *United States v. Booker*).

<sup>107</sup>*See, e.g., United States v. Green*, 21 M.J. 633 (A.C.M.R. 1985) (DD Form 139, Pay Adjustment Authorization, maintained in the accused's finance records qualified as a "personnel document" admissible under R.C.M. 1001(b)(2)). Other

R.C.M. 1001(b)(2) only sanctions evidence in documentary form.<sup>110</sup> If a proffered document is incomplete or illegible the trial counsel can correct the deficiency or establish a foundation for the admissibility of the document by presenting the live testimony of witnesses who have first hand knowledge about the document or the procedures used to generate the document.<sup>111</sup> The trial counsel must offer a document into evidence. The government may not present evidence of the personnel action solely through the use of witness testimony.<sup>112</sup> Trial counsel should also insure that copies

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relevant documents contained in the finance records include records of nonjudicial punishment, pay allotments, and statements of charges.

<sup>110</sup>The re-enlistment file may demonstrate that the accused's current desire to make the Army a career is of recent origin.

<sup>111</sup>See, e.g., *United States v. Perry*, 20 M.J. 1026 (A.C.M.R. 1985) (DD Form 508, which documented an approved recommendation for disciplinary action against the accused for disobeying a lawful order while the accused was in pretrial confinement, was admissible as a personnel record reflecting past military conduct).

<sup>112</sup>R.C.M. 1001(b)(2) provides that "the trial counsel may obtain and introduce from the personnel records of the accused evidence of . . ."; *United States v. Yong*, 17 M.J. 671 (A.C.M.R. 1983) (The trial counsel cannot prove the existence of records of nonjudicial punishment solely through the oral testimony of the company commander who imposed the punishment. The Manual limitation on the admissibility of personnel records to actual documents insures that the accused is fairly on notice regarding what can be used at trial).

But see *United States v. Albritton*, SPCM 18914 (A.C.M.R. 28 Dec. 1983) (The trial counsel can prove the accused received nonjudicial punishment solely by oral testimony so long as that testimony is reliable and trustworthy. The "personnel record" could properly be established by the testimony of the commander who imposed the punishment).

"Documentary evidence" necessarily includes only enclosures or attachments which are maintained with the document in accordance with applicable regulations. *United States v. Dalton*, 19 M.J. 718 (A.F.C.M.R. 1984).

<sup>113</sup>*United States v. Mack*, 9 M.J. 300, 324 (C.M.A. 1980) (trial counsel must establish admissibility of the document through independent evidence). In determining the admissibility of a document the military trial judge is not limited to evidence admissible under the Military Rules of Evidence. Mil. R. Evid. 104(e). But cf. *United States v. McGill*, 15 M.J. 242 (C.M.A. 1983) (foundation for admissibility of record of nonjudicial punishment offered during prosecution case-in-rebuttal could not be established by CID witness who lacked firsthand knowledge about the nonjudicial punishment proceedings).

Trial counsel should not approach the accused *ex parte* in an attempt to have the accused cure defects in the documents. *United States v. Sauer*, 15 M.J. 113 (C.M.A. 1983). In *Sauer*, the trial counsel wanted to introduce portions of the accused's service record which were incomplete because they lacked the accused's written acknowledgement of his substandard ratings. On the second day of the accused's court-martial the trial counsel contacted the accused *ex parte* and procured the entries necessary to complete the documents. The Court of Military Appeals held that the trial counsel's conduct impermissibly eroded the accused's right to counsel.

<sup>114</sup>Compare *United States v. Yong*, 17 M.J. 671 (A.C.M.R. 1983) (restricting evidence of personnel records to the presentation of documents contained in official files insures that the accused is on notice of what evidence may be considered against him or her) with *United States v. Albritton*, SPCM 18914 (A.C.M.R. 28 Dec. 1983) (proving an Article 15 through oral testimony alone was

of documents substituted in the record for originals used at trial are legible because the appellate courts must decide admissibility issues based on the authenticated record of trial.<sup>113</sup>

The Manual requires that personnel documents be prepared and maintained in accordance with service regulations.<sup>114</sup> Document preparation has been challenged on three grounds. First, that the official who took the underlying personnel action was incorrect in reaching the conclusion that the accused deserved adverse administrative action, e.g., the accused did not deserve the letter of reprimand, or the accused was innocent of the charge for which nonjudicial punishment was issued. While the accused may deny they committed the underlying misconduct<sup>115</sup> the courts should not allow the accused to re-litigate the issue during the court-martial sentencing proceeding.<sup>116</sup> Second, the defense counsel can challenge the procedures which were used to impose the personnel action. The courts will presume that procedural prerequisites for

permissible so long as the testimony was reliable and established all necessary foundational requirements).

<sup>113</sup>See, e.g., *United States v. Haynes*, 10 M.J. 694 (A.C.M.R. 1981).

<sup>114</sup>R.C.M. 1001(b)(2); AR 27-10, para. 5-25. See, e.g., *United States v. Adams*, CM 442178 (A.C.M.R. 24 Aug. 1984). Private First Class Adams was convicted at a rehearing held at Fort Leavenworth, Kansas. At sentencing the trial counsel introduced several reports of disciplinary infractions taken from the accused's correctional treatment file maintained at the United States Disciplinary Barracks where the accused had been confined since his original court-martial. The Army Court of Military Review held that it was error to admit this evidence over defense objection without some showing that these documents were prepared and maintained in accordance with service regulations.

<sup>115</sup>*United States v. Mack*, 9 M.J. 300, 323 (C.M.A. 1980) (after the prosecution introduces a record of nonjudicial punishment "the accused remains free to deny his guilt of the misconduct for which nonjudicial punishment was imposed or to offer whatever explanation for the offense he may choose"). Cf. *United States v. Balcom*, 20 M.J. 558 (A.C.M.R. 1985) (Army Court of Military Review reassessed the sentence when post-trial evidence cast doubt on the validity of a record of nonjudicial punishment introduced in aggravation by the prosecution. At trial the trial counsel introduced a record of nonjudicial punishment alleging that the accused had wrongfully used marijuana. The evidentiary basis for the Article 15 was the positive results of a urinalysis. During extenuation and mitigation the accused denied the misconduct and attempted to explain "the erroneous positive results." Three months after trial Army authorities issued a statement that the urinalysis "did not meet all scientific or legal requirements for use in disciplinary or administrative actions." The appellate court determined that under the circumstances sentence relief was appropriate).

<sup>116</sup>*United States v. Hood*, 16 M.J. 557 (A.F.C.M.R. 1983) (Accused could not challenge letter of reprimand introduced during aggravation by attempting to show that he did not commit the misconduct for which the reprimand was issued. The accused had the opportunity to respond to the reprimand before it was given and the court could consider those written matters which the accused submitted in rebuttal to the reprimand. Additionally, the accused may mitigate or explain the letter of reprimand during the defense case in extenuation and mitigation. Further litigation concerning the merits of the reprimand is too collateral).

taking the personnel action were complied with absent some evidence to the contrary.<sup>117</sup> Evidence to the contrary may be apparent on the face of the document itself<sup>118</sup> or may be

<sup>117</sup>See, e.g., *United States v. Wheaton*, 18 M.J. 159 (C.M.A. 1984); *United States v. Covington*, 10 M.J. 64 (C.M.A. 1980); *United States v. Larkins*, 21 M.J. 654 (A.C.M.R. 1985).

In *Wheaton*, the trial counsel sought to admit a record of nonjudicial punishment which did not contain any written election regarding the right to consult with counsel or the right to demand trial by court-martial. The trial counsel did offer a rights advice form which was used to inform the accused that he had the right to consult with counsel and the right to demand trial by court-martial. The court concluded that "if an accused is given written advice that he is entitled to consult counsel, then it can be presumed that counsel was made available to him. A subsidiary presumption is that, if the right to counsel was not exercised, the accused made an informed decision not to exercise the right." *Wheaton*, 18 M.J. at 160. This same type of presumption of regularity was applied to the right to demand trial by court-martial. "[I]f nonjudicial punishment was imposed after the accused was advised of his right to trial by court-martial, he must have decided not to exercise that right." *Wheaton*, 18 M.J. at 161.

In *Covington*, the court held that minimum due process necessary for a proper vacation of suspended nonjudicial punishment must include notice of the basis for the proposed vacation and an opportunity for the respondent to reply. The trial counsel offered documentary evidence that the accused had reviewed a vacation of suspended nonjudicial punishment. Although the document (DA Form 2627) did not indicate whether any due process was afforded, the court presumed that the vacation was done properly.

Finally, in *Larkins* the record of nonjudicial punishment offered at trial failed to include matters submitted on appeal. The court took the presumption of regularity one step further by presuming not only that the commander and judge advocate did their jobs properly in considering the matters submitted but also that since the appeal was denied the matters submitted must have been of limited significance.

<sup>118</sup>Compare *United States v. Moan*, SPCM 21582 (A.C.M.R. 28 Feb. 1986) with *United States v. Goldring*, CM 447817 (A.C.M.R. 28 Feb. 1986).

In *Moan*, the trial counsel introduced a DA Form 2627, Record of Proceedings under Article 15, UCMJ, which indicated that the accused elected not to appeal his punishment. Contrary to clear regulatory requirements the election not to appeal was dated one day before punishment was actually imposed. Although this discrepancy may actually have been a clerical mistake in dating the form the government could not rely on a presumption of regularity in establishing that the disciplinary action was taken in accordance with service regulations.

In *Goldring*, the DA Form 2627 indicated that the accused desired to appeal and intended to submit matters in support of the appeal. The document introduced at trial did not contain any attached matters submitted on appeal and it indicated that the accused's appeal was denied three days after punishment was imposed. The court held that even though the regulation afforded the accused five days to submit an appeal the fact that the appeal was denied before the full five days had elapsed was not an error which would deprive the document of its presumption of regularity. Instead the court presumed the accused submitted matters early and the appellate authority duly considered the appellate submissions before denying the appeal.

The most common deficiencies apparent on the face of the document are omissions where required entries or signatures are supposed to be made. See, e.g., *United States v. Dyke*, 16 M.J. 426 (C.M.A. 1983); *United States v. Blair*, 10 M.J. 54 (C.M.A. 1980); *United States v. Guerrero*, 10 M.J. 52 (C.M.A. 1980); *United States v. Carmans*, 10 M.J. 50 (C.M.A. 1980); *United States v. Burl*, 10 M.J. 48 (C.M.A. 1980); *United States v. Cross*, 10 M.J. 34 (C.M.A. 1980); *United States v.*

demonstrated through independent evidence.<sup>119</sup>

Personnel records are inadmissible due to procedural irregularity if the administrative action was taken solely to increase the court-martial sentence rather than for a legitimate regulatory purpose.<sup>120</sup> They are also inadmissible<sup>121</sup> if the accused was denied

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Mack, 9 M.J. 300 (C.M.A. 1980); *United States v. Haynes*, 10 M.J. 694 (A.C.M.R. 1981).

<sup>119</sup>The accused is the most logical source of independent evidence concerning procedures used to impose adverse personnel actions. *United States v. Mack*, 9 M.J. 300, 323 (C.M.A. 1980) (even if the personnel document is perfect on its face the defense can present independent evidence, such as the testimony of the accused, to persuade the court that proper regulatory procedures were not followed).

The independent evidence may come before the court in the form of inconsistent documentary entries. See, e.g., *United States v. Kline*, 14 M.J. 64 (C.M.A. 1982). In *Kline*, the trial counsel introduced the "Enlisted Performance" portion of the accused's naval service record. This documentary evidence reflecting substandard performance was complete and regular on its face. The trial counsel also introduced other exhibits from the service record including sections where specific entries were required whenever a sailor received adverse ratings. These additional documents did not contain the required entries. The court held that these additional documents were inadmissible because of their facial deficiencies and they negated the presumption of regularity which otherwise would have been afforded the "Enlisted Performance" document. *Kline*, 14 M.J. at 66.

<sup>120</sup>*United States v. Boles*, 11 M.J. 195 (C.M.A. 1981) (administrative reprimand hurriedly prepared specifically for use in a court-martial sentencing proceeding violated applicable regulatory provisions which defined reprimands as "corrective management tools"); *United States v. Brown*, 11 M.J. 263 (C.M.A. 1981) (Where a record of conviction was inadmissible because it was not "final" the trial counsel could not introduce a bar to reenlistment referencing that conviction. Allowing such backdoor circumventions of specific proscriptions on the admissibility of evidence in a court-martial "would be to invite the distortion and manipulation of legitimate administrative record-keeping functions"); *United States v. Hill*, 13 M.J. 948 (A.F.C.M.R. 1982) (Letter of reprimand given for bad check offenses was inadmissible on aggravation. The court concluded that the reprimand did not perform any legitimate correction or management function because the subject offenses occurred sixty days before—at the same time as other bad check offenses which were now the basis of the accused's court-martial charges); *United States v. Dodds*, 11 M.J. 520, 522 n. 3 (A.F.C.M.R. 1981) ("The fact that a matter is properly entered into the accused's personnel records . . . does not necessarily mean that the entry is also admissible in a court-martial. The military judge should exercise sound discretion in electing whether or not to admit such material. . . . For example, matters may, on balance, seem too remote to be probative; appear to have been 'manufactured', after the accuser had knowledge of the offenses charged, by those zealous to portray the accused as unfit; or be so insignificant as to suggest that the accused is not receiving even handed treatment"); accord *United States v. Sauer*, 15 M.J. 113 (C.M.A. 1983). In *Sauer*, the trial counsel wanted to introduce portions of the accused's service record reflecting sub-standard duty performance during two different periods of time. The service records were incomplete because the accused's written acknowledgement of these ratings was absent from the document. On the second day of the accused's court-martial the trial counsel contacted the accused *ex parte* and procured the entries necessary to make the document admissible. The Court of Military Appeals condemned the trial counsel's conduct, in part because of their "disapproval of the deliberate preparation of administrative records to influence a sentence in a court-martial." *Sauer*, 15 M.J. at 118.



a substantial procedural right affecting the validity of the administrative process.

*Cf. United States v. Hood*, 16 M.J. 557 (A.F.C.M.R. 1983); *United States v. Hagy*, 12 M.J. 739 (A.F.C.M.R. 1981). In *Hood*, the accused received a letter of reprimand for writing a letter to the spouse of one of the government witnesses. The letter written by the accused alleged that the witness had committed adultery and contracted a venereal disease. The Air Force Court of Military Review affirmed the principle that the letter of reprimand would be inadmissible if it was prepared solely to influence the accused's sentence at his pending court-martial but refused to adopt a mechanical approach in determining the actual purpose of the administrative action. The court specifically rejected the argument that all disciplinary actions taken after preferal of charges should be automatically excluded. Instead the court looked at the facts and determined that the commander's action fulfilled the regulatory corrective and management purpose by putting the accused on notice about his misconduct and informing him that future misconduct would be dealt with more severely. In *Hagy* the court held that filing a letter of reprimand on the day of trial did not affect admissibility so long as the subject matter of the letter was appropriate and the reprimand served a legitimate disciplinary purpose as defined by applicable regulations.

<sup>121</sup>The line between a substantial procedural right and a minor procedural defect is not always easy to determine. The courts provide many specific examples but no real standards whereby a case of first impressions could be judged. If the procedural defect relates directly to regulatory based due process rights such as notice of the contemplated action, opportunity to respond, opportunity to consult with counsel, opportunity to be represented by counsel, or opportunity to appeal then the defect is substantial and the personnel record recording that deficient personnel action is inadmissible. On the other hand, defects in recording what occurred at the proceeding which are superfluous to traditional due process rights are generally not going to make the personnel record inadmissible unless the reliability or validity of the document itself is called into question. Although these standards have never been specifically articulated by the appellate courts an analysis of cases dealing with records of nonjudicial punishment leads to these conclusions.

As already indicated, there is a presumption that procedures used to administer a personnel action, such as imposition of nonjudicial punishment, were proper absent some evidence to the contrary. This contrary evidence can consist of defense testimony concerning irregularities, inconsistencies apparent from conflicting documents, or as is most often the case, omissions and inaccuracies concerning entries made on the personnel document itself. Records of nonjudicial punishment which contain the following deficiencies are inadmissible because they indicate the accused was denied a substantial procedural right.

(1) The block on DA Form 2627 which indicates whether trial by court-martial is or is not demanded is not checked. *United States v. Mack*, 9 M.J. 300, 324 (C.M.A. 1980) (numerous deficiencies listed below); *United States v. Cross*, 10 M.J. 34 (C.M.A. 1980); *United States v. Coleman*, SPCM 18289 (A.C.M.R. 5 Aug. 1983). *But see United States v. Wheaton*, 18 M.J. 159 (C.M.A. 1984) for a discussion how this defect can be cured by presenting evidence that advice concerning the right was given to the accused;

(2) The DA Form 2627 fails to inform the soldiers that they have the right to consult with counsel prior to determining whether to demand trial by court-martial. *United States v. Mack*, 9 M.J. 300 (C.M.A. 1980);

(3) The DA Form 2627 fails to properly apprise the soldier of the right to consult with counsel because no location of counsel or time to consult is designated on the form. *United States v. Mack*, 9 M.J. 300, 321 (C.M.A. 1980) (The soldier must be supplied enough information about how to exercise the right to consult with counsel to make the right meaningful. If the form itself fails to supply the information the trial counsel must present other evidence to show the accused had a reasonable opportunity to consult with counsel and either exercised or voluntarily waived the right);

Finally, the defense counsel may allege that the document itself

(4) The block on DA Form 2627 which indicates whether or not the accused intend to appeal is not checked. *United States v. Mack*, 9 M.J. 300, 324 (C.M.A. 1980); *United States v. Rabago*, SPCM 20782 (A.C.M.R. 4 Oct. 1984);

(5) The DA Form 2627 indicates that the accused appealed the punishment but there is no indication on the form what action was taken on the appeal. *United States v. Burl*, 10 M.J. 48 (C.M.A. 1980); *United States v. Mack*, 9 M.J. 300, 324 (C.M.A. 1980);

(6) The DA Form 2627 indicates that the accused appealed the punishment and the punishment imposed was of a type requiring legal review but that there is no indication on the form that the matter was referred to a judge advocate for review. *United States v. Guerrero*, 10 M.J. 52 (C.M.A. 1980); *United States v. Mack*, 9 M.J. 300, 324 (C.M.A. 1980);

(7) The DA Form 2627 indicated that the accused elected not to appeal the imposition of the nonjudicial punishment before the punishment was ever actually imposed. *United States v. Moan*, SPCM 21582 (A.C.M.R. 28 Feb. 1986).

The clear trend of the courts is to attempt to preserve admissibility of the personnel record whenever possible. The following cases held that records of nonjudicial punishment were admissible even though there was evidence of some procedural irregularity:

(1) The DA Form 2627 failed to state the alleged offense in a form which would be legally sufficient for a specification preferred as a court-martial charge. *United States v. Nichols*, 13 M.J. 154 (C.M.A. 1982) (Article 15 for "possession of a controlled substance" was not too indefinite to provide the accused with adequate notice of the alleged offense); *United States v. Atchison*, 13 M.J. 798 (A.C.M.R. 1982) (Article 15 for "failure to repair" was adequate despite the fact the place of duty was not identified with any precision); *United States v. Eberhardt*, 13 M.J. 772 (A.C.M.R. 1982) (Article 15 for absence without authority was admissible even though the allegation on the DA Form 2627 omitted the words "without authority" and failed to specify the location of the accused's place of duty);

(2) The copy of the DA Form 2627 procured from the Military Personnel Record Jacket (MPRJ) and introduced at trial was a reproduced duplicate of the original rather than the designated carbon copy which the regulation specified for filing in the MPRJ. *United States v. Moan*, SPCM 21582 (A.C.M.R. 28 Feb. 1986) (The Army Court of Military Review took judicial notice of the fact that many units substitute duplicate originals for carbon copies because they are more legible. The court went on to opine that this was the type of minor deviation from regulatory procedures which in no way cast doubt on the reliability of the procedures used to impose nonjudicial punishment). See also *United States v. King*, CM 447976 (A.C.M.R. 19 Mar. 1986); *United States v. Hufnagel*, SPCM 21479 (A.C.M.R. 20 Nov. 1985);

(3) The DA Form 2627 failed to include the accused's acknowledgement of the action taken on his appeal. *United States v. Carmans*, 10 M.J. 50 (C.M.A. 1980);

(4) The DA Form 2627 failed to indicate how much time the accused had to submit an appeal. *United States v. Blair*, 10 M.J. 54 (C.M.A. 1980);

(5) The DA Form 2627 failed to indicate whether the accused requested an open hearing. *United States v. Haynes*, 10 M.J. 694, 697 (A.C.M.R. 1981) (Since an open hearing is not an absolute procedural right and can properly be denied by the commander it is not a material entry on the DA Form 2627. Putting the accused's election on the document is merely a way to facilitate making the request);

(6) The DA Form 2627 failed to indicate whether the accused requested the presence of a spokesman. *United States v. Haynes*, 10 M.J. 694, 697 n. 3 (A.C.M.R. 1981) (The DA Form 2627 is merely a vehicle by which the accused can request a spokesman. There is no due process right to have a spokesman present);

(7) The DA Form 2627 failed to indicate whether the accused intended to present matters in defense and/or extenuation. *United States v. Haynes*, 10 M.J. 694, 697 n. 3 (A.C.M.R. 1981) (What the soldier actually presents at the hearing is



was not prepared in accordance with applicable regulations.<sup>122</sup> A document which has no irregularities apparent on its face carries with it a presumption that the document was prepared in accordance with procedures required by applicable regulations.<sup>123</sup> This presumption is lost when required entries on the document are omitted, incomplete, illegible, or inaccurate;<sup>124</sup> or when the wrong person prepared the document.<sup>125</sup> The proffered document should be excluded if the irregularity undermines confidence in the reliability of the document or indicates that required procedures were not followed in taking the personnel action.<sup>126</sup> If the irregularity is minor or involves a clerical error in recording matters the document should be admitted.<sup>127</sup>

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not controlled by entries on the DA Form 2627. The right to present matters for consideration is exercised at the hearing, not on the form);

(8) The DA form 2627 failed to include the date the accused was notified of the intent to impose nonjudicial punishment. *United States v. Haynes*, 10 M.J. 694, 697 (A.C.M.R. 1981) (absent some other indication of impropriety or some specific defense allegation that the time between notification and imposition of punishment deprived the soldier of procedural rights, the date of notification is immaterial).

<sup>122</sup>Distinguish this objection from an objection that improper procedures were followed in implementing the adverse administrative action. While defects in the document preparation and defects in administrative procedure are usually interrelated they are not necessarily one and the same. It is possible that one official properly took the action but a second official improperly recorded the action on the personnel documents. See *supra* note 118 (discussing *United States v. Moan*).

<sup>123</sup>See, e.g., *United States v. Steinruck*, 11 M.J. 322 (C.M.A. 1981) (DA Form 2627 entitled to a presumption of regularity even where a required signature was illegible but still visible).

<sup>124</sup>See, e.g., *United States v. Dyke*, 16 M.J. 426 (C.M.A. 1983); *United States v. Cross*, 10 M.J. 34 (C.M.A. 1980); *United States v. Negrone*, 9 M.J. 171 (C.M.A. 1980); *United States v. Brown*, CM 442140 (A.C.M.R. 19 Oct. 1984). These cases involved DA Form 2627 and the omission of signatures, dates, and checked blocks. See also *United States v. Stewart*, 12 M.J. 143 (C.M.A. 1981) (lack of legible commander signature on vacation of suspension of nonjudicial punishment); *United States v. Messer*, SPCM 21203 (A.C.M.R. 17 June 1985) (failure to introduce continuation sheet with the DA Form 2627); *United States v. Wilson*, SPCM 20126 (A.C.M.R. 13 Apr. 1984) (record of supplementary action vacating suspension of nonjudicial punishment contained no check in block indicating the accused was afforded an opportunity to respond at the vacation proceeding).

<sup>125</sup>See, e.g., *United States v. Johnson*, 14 M.J. 566 (N.M.C.M.R. 1982) (improper for the trial counsel to fill in missing information).

<sup>126</sup>See *supra* note 121.

<sup>127</sup>See *id.* See also *United States v. Casey*, SPCM 21905 (A.C.M.R. 13 Jan. 1986). In *Casey*, the trial judge sustained a defense objection to a DA Form 2627 because the grade of the commander was missing from the block containing his name and organization. Although no issue involving sentencing was raised on appeal the Army Court of Military Review opined in dicta that the "trial judge erroneously sustained the objection. This ruling was of the sort which elevates form over substance."

If the personnel document is regular on its face and there is no other evidence of irregularity before the court the defense counsel must object with specificity at trial<sup>128</sup> or appellate review of

<sup>128</sup>Mil. R. Evid. 103 (defense counsel must make "a timely objection" with "the specific ground" therefor). R.C.M. 1001(b)(2) ("objections not asserted are waived"); *United States v. Kline*, 14 M.J. 64, 66 (C.M.A. 1982).

The courts sometime reach this result without explaining how or why waiver applies. The Military Rules of Evidence and the 1984 Manual for Courts-Martial clearly contemplate waiver of some objections when they are not raised at trial. If there are no irregularities apparent on the face of a document it makes sense to put the burden on the defense to discover defects during their preparation of the case. Waiver of appellate review is particularly appropriate when the defect raised for the first time on appeal is one which the trial counsel could have explained or cured at trial given adequate notice. See *United States v. Gordon*, 10 M.J. 278 (C.M.A. 1981) (A record of nonjudicial punishment introduced during aggravation allegedly was maintained at the Air Force Manpower and Personnel Center rather than the Local Consolidated Base Personnel Office—as required by Air Force regulations. Failure to object at trial waived the issue on appeal); *United States v. McLemore*, 10 M.J. 238 (C.M.A. 1981) (The trial counsel introduced evidence of nonjudicial punishment which included advice concerning the accused's right to consult with counsel but did not contain any entry indicating whether or not the accused demanded trial by court-martial. The court held that this issue was waived by defense counsel's failure to object at trial. The court distinguished this case from other cases where a form which contained an unchecked block was introduced at trial. When the form contains an unchecked box the trial judge is on notice that there are defects in the preparation of the document and possible defects in the procedures used to administer the nonjudicial punishment. Here the document simply failed to contain all the information necessary to establish a basis for admissibility); *United States v. Larkins*, 21 M.J. 654 (A.C.M.R. 1985) (The DA Form 2627 did not contain matters submitted on appeal. Since this is not a defect on the face of the document the issue was waived by the defense counsel's failure to object at trial); *United States v. Brown*, CM 442140 (A.C.M.R. 19 Oct. 1984) (Defense counsel failure to object at trial to three records of nonjudicial punishment waived appellate review. If there had been an objection at trial the government may have been able to present evidence to establish admissibility).

When there has been an objection to the document at trial the appellate courts will review admissibility only on the basis of the specific grounds for objection raised at trial. See, e.g., *United States v. Goldring*, CM 447817 (A.C.M.R. 28 Feb. 1986) (The trial counsel introduced a record of nonjudicial punishment which indicated the accused would submit matters on appeal within five days. The document further indicated that the appeal was denied only three days after punishment was imposed and no matters on appeal were attached to the DA Form 2627. At trial the defense counsel objected that the document offered into evidence was incomplete. The appellate court reviewed admissibility based on the alleged lack of completeness but held that any objection concerning an early denial of the appeal was waived by failure to cite that as a specific ground for objection at trial); *United States v. Sager*, SPCM 21627 (A.C.M.R. 18 Nov. 1985) (The trial counsel introduced two records of nonjudicial punishment which were filed in the unit file but contained no copy number. The defense counsel objected that without a copy number it was impossible to tell whether the unit document custodian was the proper official to authenticate the documents. The appellate court rejected this argument but noted that one of the Article 15 records was supposed to have been filed in the accused's performance fiche of the OMPF and should not have been maintained in the unit file at all. The court went on to hold that this defect was not a specified ground for objection at trial and was waived on appeal); *United States v. Davis*, CM 443665 (A.C.M.R. 17 Aug. 1983) (Defense counsel successfully objected at trial to a bar to re-enlistment document which contained a reference to

admissibility is waived. If the document is irregular on its face or other evidence before the court makes it apparent the document is defective defense counsel's failure to object will normally waive appellate review<sup>129</sup> although the trial judge's failure to *sua sponte* exclude the evidence may constitute plain error.<sup>130</sup>

an inadmissible nonjudicial punishment. The illegal reference was redacted. On appeal the defense attempted to establish that the document was inadmissible because regulatory procedures were not followed in reviewing the document every six months. Failure to object at trial with specificity waived the objection; *United States v. Easley*, CM 442776 (A.C.M.R. 25 May 1983) (Defense counsel objected at trial to an entry on the DA Form 2-1 indicating "SM NOT RECOMMENDED FOR FURTHER SERVICE." Under applicable regulations this entry was proper if it was made pursuant to a proper bar to re-enlistment. On appeal the defense contended for the first time that the entry was improper because the accused's bar to re-enlistment had not been reviewed by the commander six months after it was imposed. The court held that this objection was waived by the defense counsel's failure to specify that ground for objection at trial where the matter could have been clarified through examination of the basic "Bar to Re-enlistment" document).

*Accord United States v. Stanley*, SPCM 21586 (A.C.M.R. 23 Oct. 1985) (The trial counsel introduced a Bar to Re-enlistment, DA Form 4126-R, which improperly referenced an Article 15 for wrongful use of marijuana. The defense counsel objected at trial, citing the best evidence rule as the only ground for objection. The appellate court issued the following warning:

[W]e could possibly consider this waiver of any other objection. Due to the context of this objection at trial, we will look at this in the light most favorable to appellant. However, we caution counsel about the need to state the specific ground or grounds for an objection and not rely upon the ground or grounds being apparent from the context of the transcript.

*Stanley*, slip op. at n. 1.

<sup>129</sup>*United States v. Larkins*, 21 M.J. 654 (A.C.M.R. 1985) (defense counsel's failure to object at trial to an allegedly incomplete DA Form 2627 waived the issue on appeal); *United States v. Johnson*, SPCM 21232 (A.C.M.R. 16 Aug. 1985) (defense counsel's failure to object at trial to a Bar to Re-enlistment, DA Form 4126-R, which was reproduced only on one side, waived the issue on appeal); *United States v. Peyton*, SPCM 19880 (A.C.M.R. 31 July 1984) (failure to object to an otherwise inadmissible enlistment document reflecting preservice drug experimentation waived the issue on appeal); *United States v. Plissak*, 15 M.J. 767 (A.F.C.M.R. 1983) (defense counsel's failure to object to letter of reprimand waived any error in its admission); *United States v. McCullar*, ACM S25989 (A.F.C.M.R. 1 Nov. 1983) (failure to object to record of nonjudicial punishment erroneously maintained in files longer than two years waived the objection on appeal).

<sup>130</sup>*Mil. R. Evid.* 103 provides that:

Error may not be predicated upon a ruling which admits... evidence unless the ruling materially prejudices a substantial right of a party, and... a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context... Nothing in this rule precludes taking notice of plain errors that materially prejudice substantial rights although they were not brought to the attention of the military judge.

In *United States v. Kline*, 14 M.J. 64 (C.M.A. 1982), the court held that the trial judge was obligated *sua sponte* to exclude a document as inadmissible hearsay where the evidence at trial put him on notice that they were procedural

It is important for trial counsel to review the accused's personnel records as soon as possible. If documents in the local file are incomplete, illegible, or inaccurate admissibility may be salvaged by getting a copy from another source,<sup>131</sup> by having the proponent of the document correct the defect, or by getting the defense to waive objections. If a document with irregularities on its face is offered at trial insure that defense counsel affirmatively

irregularities in preparing the document. Although *Kline* pre-dated adoption of the Military Rules of Evidence the same result is reached under the Rules if the error materially prejudiced substantial rights of the accused and admission of the document was "plain error." Mil. R. Evid. 103 contemplates a two part test: first the error must be obvious based on the evidence introduced at trial and second, the accused must have been substantially prejudiced. See *United States v. Dyke*, 16 M.J. 426 (C.M.A. 1983) (military judge should have excluded a record of nonjudicial punishment on his own motion where the document was a significant factor on sentencing and the document admitted at trial did not contain the signature of the commander indicating he advised the accused of his rights; the signature of the accused indicating whether he demanded trial by court-martial; the signature of the commander attesting that punishment was imposed; or the signature of the accused indicating his election regarding an appeal); see also *United States v. James*, CM 443585 (A.C.M.R. 27 Dec. 1983) (plain error to admit facially illegible and incomplete Article 15); *United States v. Calin*, 11 M.J. 722 (A.F.C.M.R. 1981) (plain error to admit evidence that the accused "pled guilty to theft in state court" where there was no evidence that the information came from any personnel record maintained in accordance with service regulations).

In determining whether the accused was prejudiced by the admission of an obviously defective personnel document the appellate courts look at a variety of factors to include in the severity of the sentence adjudged, the sentence limitation agreed to in a pretrial agreement, the nature of the uncharged misconduct reflected in the personnel document, the quantity and quality of other aggravation evidence, and the emphasis placed on the personnel document by the trial counsel during argument or the military judge during instructions. See, e.g., *United States v. Dyke*, 16 M.J. 426 (C.M.A. 1983) (trial counsel's reliance on the defective Article 15 during sentencing argument was an indication that admission of the document prejudiced the accused); *United States v. Harms*, ACM S26449 (A.F.C.M.R. 3 Oct. 1984) (not plain error to admit defective Article 15 for "failing a dormitory room inspection" where the misconduct involved was insignificant compared to the drug distribution offenses which were the basis for the court-martial conviction); *United States v. McCullar*, ACM S25989 (A.F.C.M.R. 1 Nov. 1983) (not plain error to admit defective Article 15 because proper admission of two other records of nonjudicial punishment and three letters of reprimand mitigated impact of inadmissible Article 15 on sentence adjudged); *United States v. Beaudion*, 11 M.J. 838 (A.C.M.R. 1981) (not plain error to admit defective Article 15 where there was no miscarriage of justice, no impugment of the court's integrity, and no denial of the accused's fundamental rights).

Compare *United States v. Bolden*, 16 M.J. 722 (A.F.C.M.R. 1983) (not plain error to admit Article 15 over two years old where Article 15 was for failure to repair and disobeying an order to empty an ashtray but the accused stood convicted of drug offenses at the court-martial) with *United States v. Yarbrough*, 15 M.J. 569 (A.F.C.M.R. 1982) (plain error to admit Article 15 over two years old where the Article 15 and the court-martial conviction were both for drug offenses. There was substantial risk that the accused was punished for a course of conduct involving drugs).

<sup>131</sup>For example records of nonjudicial punishment may be filed in the accused's finance records or in the Official Military Personnel File (OMPF).

waives all objections on the record to avoid the possibility of having the appellate courts invoke the plain error rule.<sup>132</sup>

If the personnel document is properly prepared the next step is to ask whether the document is properly maintained in accordance with applicable regulations. If the document is not properly filed in a system of "personnel documents" it is not admissible under R.C.M. 1001(b)(2).<sup>133</sup> Absent some evidence to the contrary personnel documents are presumed to be maintained in accordance with regulations.<sup>134</sup>

Once it is determined that the offered personnel record fits within one of the enumerated categories of aggravation evidence in R.C.M. 1001(b) trial counsel should then insure that the document offered into evidence is in a form admissible under the Military Rules of Evidence. Because the rules of evidence are not

<sup>132</sup>Appellate courts have held plain error when the defense counsel failed to object to a document after the military judge asked whether there was any objection, but none of the cases have held plain error when a specific defect was brought to the defense counsel's attention and objection was specifically waived on the record.

<sup>133</sup>See, e.g., *United States v. Yong*, 17 M.J. 671 (A.C.M.R. 1983) (two Article 15 records maintained by the company clerk in the company files were not admissible because they were not maintained in accordance with applicable regulations); *United States v. Rust*, SPCM 19017 (A.C.M.R. 14 Oct. 1983) (the trial counsel failed to affirmatively demonstrate that a record of nonjudicial punishment was maintained in compliance with applicable military regulations concerning recordkeeping when matters in extenuation and mitigation weren't attached to the copy of the document introduced at trial); *United States v. Elrod*, 18 M.J. 692 (A.F.C.M.R. 1984) (Article 15 filed locally at the office of the staff judge advocate was not maintained in accordance with applicable Air Force regulations); *United States v. Bertalan*, 18 M.J. 501 (A.F.C.M.R. 1984) (records of nonjudicial punishment were not admissible where the copy introduced at trial came from a file not authorized by Air Force regulations); *United States v. Garner*, ACM 24019 (A.F.C.M.R. 9 Dec. 1983) (error to admit a seven year old Article 15 when Air Force regulations only authorized admission of Article 15's which were less than two years old).

But see *United States v. Moan*, SPCM 21582 (A.C.M.R. 28 Feb. 1986) (A duplicate original of a DA Form 2627 was admissible even though regulations stated "copy 3" should be filed in the unit file. The court held that this constituted "substantial compliance" with the filing requirements of AR 27-10); accord *United States v. King*, CM 447976 (A.C.M.R. 19 Mar. 1986); *United States v. Hufnagel*, SPCM 21479 (A.C.M.R. 20 Nov. 1985).

<sup>134</sup>See, e.g., *United States v. Haslam*, CM 446000 (A.C.M.R. 26 Nov. 1984) (there was a presumption of regularity that Personnel Reliability Program information was properly maintained in the accused's personnel file in accordance with applicable regulations).

But see *United States v. Adams*, CM 442178 (A.C.M.R. 24 Aug. 1984) (The trial counsel introduced records of disciplinary infractions from the accused's correctional treatment file at the United States Disciplinary Barracks. The defense counsel objected that there was no evidence these files were maintained in accordance with applicable regulations. The court held that once the defense objected the government had to affirmatively show that the proffered documents were maintained in accordance with regulations).



yet relaxed during the case of aggravation,<sup>135</sup> the document must be properly authenticated<sup>136</sup> and must fit within one of the recognized hearsay exceptions of Mil. R. Evid. 803.<sup>137</sup> Personnel records can be properly authenticated by testimony of a witness who has personal knowledge that the document came from personnel records<sup>138</sup> or by an attesting certificate of the record's custodian.<sup>139</sup>

Personnel records are admissible as hearsay exceptions under either Mil. R. Evid. 803(6) (Records of regularly conducted activity)<sup>140</sup> or Mil. R. Evid. 803(8) (Public records and reports).<sup>141</sup>

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<sup>135</sup>Mil. R. Evid. 1101 (The Military Rules of Evidence apply to all aspects of the court-martial except those areas specifically excluded by the rule. The rule does not exempt the presentencing case in aggravation); *United States v. Elrod*, 18 M.J. 692 (A.F.C.M.R. 1984) ("There is no authority to relax the rules of evidence as to presentencing matters initially offered by the prosecution").

<sup>136</sup>Mil. R. Evid. sec. IX. See, e.g., *United States v. Bertalan*, 18 M.J. 501 (A.F.C.M.R. 1984) (punishment indorsements evidencing nonjudicial punishment were inadmissible where they lacked proper authentication).

<sup>137</sup>Mil. R. Evid. 802 (hearsay is not admissible except as otherwise provided by the rules of evidence or by any Act of Congress applicable in trials by court-martial).

<sup>138</sup>Mil. R. Evid. 901(b)(1) (authentication can be made by the testimony of a witness who has personal knowledge that a matter is what it is claimed to be).

<sup>139</sup>Technically there are two ways to authenticate with an attesting certificate depending upon whether the document offered is an original or a copy. If the trial counsel offers the original of the document Mil. R. Evid. 902(4a) requires only that the document be accompanied by an attesting certificate from the custodian of the record. The attesting certificate itself requires no further authentication and need not be under seal. In practice this method of authentication should apply to duplicates of originals so long as there is no genuine question raised about the authenticity of the original. See Mil. R. Evid. 1001(4) (definition of "duplicate"); Mil. R. Evid. 1003 (admissibility of duplicates).

A literal reading of Mil. R. Evid. 902 and Mil. R. Evid. 1003 would lead to a different analysis for admission of duplicates (or copies) if a genuine question is raised concerning authenticity. A copy of a personnel record can be authenticated by a certificate of the custodian pursuant to Mil. R. Evid. 1001(4). Mil. R. Evid. 1001(4) would require the attesting certificate to be accompanied by a certification under seal that the record custodian has official capacity and has placed a genuine signature on the attesting certificate. Mil. R. Evid. 902(2).

See *United States v. Jaramillio*, 13 M.J. 782 (A.C.M.R. 1982) (authenticating certificate was defective where it was prepared for the signature of a captain who was the actual custodian of the record but instead was signed by a warrant officer whose duty position and relationship to the document were not indicated); *United States v. Elrod*, 18 M.J. 692 (A.F.C.M.R. 1984) (Article 15 filed at the Air Force Manpower and Personnel Center could not be proven by introducing a copy filed locally which was accompanied by a certification from the local record custodian (that it was a true copy of the original forwarded for inclusion in the accused's personnel records) combined with an electronic message from the Air Force Manpower and Personnel Center verifying that the original of the Article 15 was filed in the accused's Master Personnel File).

<sup>140</sup>Mil. R. Evid. 803(6) provides that "records of regularly conducted activity" are admissible as exceptions to the hearsay rule even though the declarant is available as a witness. "Records of regularly conducted activity" is defined as:



If the document offered at trial is regular and complete on its face there is a presumption of regularity concerning the foundation for either of these two exceptions.<sup>142</sup> If the documents contain

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A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

The rule lists personnel accountability documents, service records, officer and enlisted qualification records, and unit personnel diaries as some of the documents admissible under this exception.

See, e.g., *United States v. Simon*, CM 447573 (A.C.M.R. 23 May 1986) (Trial counsel introduced a Dep't of Defense Investigative Service file extract indicating "records checked at X court showed the accused had a civilian conviction for armed robbery." The court held that this document failed to satisfy Mil. R. Evid. 803(6) because it lacked indicia of reliability and should have been excluded as inadmissible hearsay).

"Mil. R. Evid. 803(8) provides that "public records and reports" are admissible as exceptions to the hearsay rule even though the declarant is available as a witness. "Public records and reports" are defined as follows:

Records, reports, statements, or data compilations, in any form, of public office or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, matters observed by police officers and other personnel acting in a law enforcement capacity, or (C) against the government, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information of other circumstances indicate lack of trustworthiness. Notwithstanding (B), the following are admissible under this paragraph as a record of fact or event if made by a person within the scope of the person's official duties and those duties included a duty to know or to ascertain through appropriate and trustworthy channels of information the truth of the fact or event and to record such fact or event: enlistment papers, physical examination papers, outline figure and fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, records of court-martial convictions, logs, unit personnel diaries, individual equipment records, guard reports, daily strength records of prisoners, and rosters of prisoners.

See, e.g., *United States v. Simon*, CM 447573 (A.C.M.R. 23 May 1986) (Trial counsel introduced a Dep't of Defense Investigative Service file extract indicating "records checked at X court showed the accused had a civilian conviction for armed robbery." The court held that this document failed to satisfy Mil. R. Evid. 803(8) (as well as Mil. R. Evid. 803(6)) because it lacked indicia of reliability and should have been excluded as inadmissible hearsay.).

<sup>142</sup>*United States v. Anderten*, 4 C.M.A. 354, 15 C.M.R. 354 (1954) (official records lose the presumption of regularity only if there are material omissions or defects in the document); *United States v. Haynes*, 10 M.J. 694 (A.C.M.R. 1981) (admissibility of an official record is not destroyed by minor mistakes or omissions which are

substantial irregularities this presumption does not apply and the trial counsel has to lay the foundational prerequisite for one of these two hearsay exceptions.<sup>143</sup>

Finally, even if a personnel record fits within R.C.M. 1001(b)(2) and is in a form admissible under the Military Rules of Evidence the trial judge has broad discretion to exclude the evidence by applying the balancing test of Mil. R. Evid. 403.<sup>144</sup>

Records of nonjudicial punishment are admissible during the case in aggravation as "personnel records" subject to the same limitations as any other personnel document.<sup>145</sup> In addition records of nonjudicial punishment must comply with the fundamental requirements of *United States v. Booker*.<sup>146</sup> The accused must have been afforded the opportunity to demand trial by court-martial and must have had the opportunity to consult

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not material to the execution of the document); *United States v. Arispe*, 12 M.J. 516 (N.M.C.M.R. 1981) ("A mere irregularity or omission in the entry of a fact required to be rendered in an official record does not of itself place the record outside the exception to the hearsay rule and make it incompetent. Only those irregularities or omissions material to the execution of the document would have that effect").

<sup>143</sup>For examples of how to lay an appropriate foundation see Dep't of Army, Pamphlet No. 27-10, Military Justice Handbook for Trial Counsel and the Defense Counsel, p. 4-29 (Oct. 1982); E. Imwinkelried, *Evidentiary Foundations* 173-76 (1980).

<sup>144</sup>*United States v. Martin*, 20 M.J. 227 (C.M.A. 1985); see also *United States v. Kilburn*, CM 448103 (A.C.M.R. 14 May 1986); *United States v. Perry*, 20 M.J. 1026 (A.C.M.R. 1985); *United States v. Bobick*, NMCM 85 0450 (N.M.C.M.R. 28 Oct. 1985).

In *Kilburn*, the trial judge properly applied the Mil. R. Evid. 403 balancing test in admitting DA Form 2-1 (Personnel Qualifications Record—Part 2) which showed that the accused had been AWOL for one day.

In *Perry*, the trial counsel introduced a DD Form 508 which documented an approved recommendation for disciplinary action against the accused for disobeying a lawful order while in pretrial confinement. The defense argued on appeal that as a prerequisite to admissibility some minimum due process should be required in the form of notice, opportunity for a hearing, and right to counsel. The court held that the trial judge properly admitted the document because the balancing test of Mil. R. Evid. 403 adequately protects the accused's rights to fundamental fairness.

In *Bobick*, the trial counsel introduced service record entries indicating that on three occasions during a prior enlistment the accused was counselled about alleged use of marijuana and other dangerous substances. No further action was taken on the allegations due to insufficiency of evidence. The Navy-Marine Corps Court of Military Review held that the trial judge abused his discretion in admitting these entries over defense objection. The limited probative value of remote, unsubstantiated allegations of serious misconduct is substantially outweighed by the danger of unfair prejudice and confusion.

<sup>145</sup>AR 27-10, para. 5-25.

<sup>146</sup>*United States v. Mack*, 9 M.J. 300 (C.M.A. 1980); *United States v. Booker*, 5 M.J. 238 (C.M.A. 1978). These requirements do not apply to soldiers or sailors who receive nonjudicial punishment while embarked on a vessel. *Mack*, 9 M.J. at 320 n. 19.

counsel concerning this election of rights.<sup>147</sup> A properly completed DA Form 2627, Record of Proceedings Under Article 15, UCMJ, carries with it a *prima facie* showing of compliance with these "Booker requirements."<sup>148</sup> If the DA Form 2627 is incomplete or illegible it fails to establish Booker compliance<sup>149</sup> and trial counsel must resort to one of two alternate methods of establishing this foundation.

First, the trial counsel may establish the Booker requirements by presenting the live testimony of witnesses who have firsthand knowledge that the accused was afforded the opportunity to consult with counsel and demand trial by court-martial.<sup>150</sup>

Second, the trial counsel may establish a presumption of Booker compliance by establishing through documentary evidence or witness testimony that the accused was advised of the Booker rights and that nonjudicial punishment was subsequently imposed.<sup>151</sup>

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<sup>147</sup>The opportunity to consult with counsel must be reasonable. The accused must be notified where counsel can be located and when the consultation can take place. *United States v. Mack*, 9 M.J. 300, 321 (C.M.A. 1980). See also *United States v. Wadley*, SPCM 19034 (A.C.M.R. 31 May 1983) (advice to "visit TDS to consult counsel" was sufficient notice of the right to consult with counsel).

<sup>148</sup>*United States v. Sauer*, 15 M.J. 113, 115 (C.M.A. 1983) (a "record of nonjudicial punishment which on its face appears to be properly executed satisfies the conditions precedent for its admissibility"); *United States v. Mack*, 9 M.J. 300 (C.M.A. 1980).

<sup>149</sup>*United States v. Sauer*, 15 M.J. 113, 115 (C.M.A. 1983); *United States v. Cross*, 10 M.J. 34 (C.M.A. 1980); *United States v. Mack*, 9 M.J. 300 (C.M.A. 1980).

<sup>150</sup>The trial counsel cannot present evidence of the accused's nonjudicial punishment through a witness whose testimony is hearsay. *United States v. McGill*, 15 M.J. 242 (C.M.A. 1983); *United States v. White*, 19 M.J. 662 (C.G.C.M.R. 1984).

In *White*, the trial counsel introduced a portion of the accused's service record documenting nonjudicial punishment. To establish Booker compliance the government presented a military personnel officer's testimony that pre-mast procedures, which were uniformly followed in the command, included the opportunity to consult with counsel and an opportunity to demand trial by court-martial. The Coast Guard Court of Military Review held that this second-hand testimony was insufficient to demonstrate compliance with the Booker requirements.

<sup>151</sup>*United States v. Wheaton*, 18 M.J. 159 (C.M.A. 1984). An advice form telling the accused of the right to consult with counsel and the right to demand trial by court-martial satisfies Booker requirements absent evidence to the contrary. In reaching this result the court engaged in a series of presumptions:

[I]f an accused is given written advice that he is entitled to consult counsel, then it can be presumed that counsel was made available to him. A subsidiary presumption is that, if the right to counsel was not exercised, the accused made an informed decision not to exercise the right... [I]f nonjudicial punishment was imposed after the accused was advised of his right to trial by court-martial, he must have decided not to exercise that right.

Trial counsel should be alert for *Booker* issues when presenting any personnel document which may collaterally refer to a summary court-martial conviction or nonjudicial punishment.<sup>152</sup> Personnel documents may not be used as a "backdoor" means of introducing otherwise inadmissible summary courts-martial convictions or records of nonjudicial punishment.<sup>153</sup> Although it is unclear how far the trial judge must go in ferreting out "backdoor" references<sup>154</sup> the safest approach is to redact all

*Wheaton*, 18 M.J. at 160.

See also *United States v. Thompson*, NMCM 85 3415 (N.M.C.M.R. 29 Nov. 1985) (Trial counsel introduced a page 13 from the accused's service record book containing a report of nonjudicial punishment and an unsigned *Booker* advisal which incorporated by reference the execution of a form containing a *Booker* advice. This evidence of rights advice together with evidence that trial by court-martial was not demanded satisfied *Booker*).

<sup>152</sup>This issue most commonly arises when trial counsel offers a bar to re-enlistment or letter of reprimand but even a seemingly innocuous document like the DA Form 2-1 may contain a reference to an Article 15 or a summary court-martial conviction.

<sup>153</sup>Compare *United States v. Brown*, 11 M.J. 263 (C.M.A. 1981) (reference to three inadmissible Article 15's in an otherwise admissible bar to re-enlistment constituted prejudicial error) with *United States v. Dalton*, 19 M.J. 718 (A.C.M.R. 1984) (enclosures to a bar to re-enlistment such as counselling statements and military police reports are admissible as part of the document).

See also *United States v. Krewson*, 12 M.J. 157 (C.M.A. 1981) (if a prior conviction is inadmissible for failure to satisfy foundational requirements, references to the conviction contained in otherwise admissible personnel documents should be removed); *United States v. Copeland*, SPCM 20818 (A.C.M.R. 11 Jan. 1985) (error to admit a personnel document reflecting a reduction in grade occasioned by an inadmissible vacation of a suspended Article 15); *United States v. Warren*, 15 M.J. 776 (A.C.M.R. 1983) (DA Form 2-1 entry indicating the accused had been a trainee at the U.S. Army Retraining Brigade was an impermissible reference to an inadmissible summary court-martial conviction); *United States v. Jaramillio*, 13 M.J. 782 (A.C.M.R. 1982) (DA Form 2-1 entry indicating the accused had been a trainee at the U.S. Army Retraining Brigade was inadmissible but entries on the DA Form 2-1 indicating time lost due to unauthorized absence are admissible because they are computed independent of any judicial or nonjudicial action).

<sup>154</sup>Compare *United States v. Warren*, 15 M.J. 776 (A.C.M.R. 1983) with *United States v. Jaramillio*, 13 M.J. 782 (A.C.M.R. 1982). *Warren* represents the clear case. In *Warren* the trial counsel attempted to introduce evidence of the accused's summary court-martial conviction but was precluded from doing so because the documents failed to show *Booker* compliance. The trial counsel was then permitted to introduce DA Form 2-1 indicating the accused had been a trainee at the U.S. Army Retraining Brigade. The court held that once evidence of the summary court-martial conviction had been ruled inadmissible the government could not introduce backdoor evidence of the same conviction through other personnel documents.

In *Jaramillio* the court also held that DA Form 2-1 entries listing the accused's prior assignment as trainee in the U.S. Army Retraining Brigade were inadmissible but the court seems to create a more rigorous standard. Unlike the situation in *Warren*, there was no prior adjudication of the admissibility of a summary court-martial conviction. In fact there was no firm evidence that the accused's assignment was the result of a summary court-martial as opposed to some other level of court-martial. The court held the entries inadmissible because it could not

references to nonjudicial punishment or summary courts-martial from the personnel documents offered at trial unless trial counsel is prepared to establish compliance with *Booker*.<sup>156</sup>

The military judge may not question the accused to establish compliance with *Booker*.<sup>156</sup> Although this was acceptable at one time,<sup>157</sup> since 1983 the practice of questioning the accused during sentencing has been prohibited even if the accused already waived the right against self-incrimination by pleading guilty.<sup>158</sup> If a record of nonjudicial punishment is otherwise inadmissible the accused probably cannot be compelled to stipulate to the admissibility of the record as a condition of a pretrial agreement.<sup>159</sup>

When presenting personnel documents containing unfavorable information about the accused trial counsel should be prepared to also offer any favorable personnel information which is contained on the same document or which is contained on other documents in the same personnel file. If the document being introduced in aggravation is incomplete the defense counsel, through a timely objection, can compel the trial counsel to present a complete document.<sup>160</sup> If the trial counsel introduces a portion of the accused's personnel record as aggravation evidence the same rule of completeness applies and the defense counsel, through a timely

"be ascertained . . . whether the confinement, which was of 24 days duration, was adjudged by a summary court-martial and, if so, whether the *Booker* requirements were met." *Jaramillio*, 13 M.J. at 783.

<sup>156</sup>See *supra* notes 150, 151.

<sup>157</sup>*United States v. Sauer*, 15 M.J. 113 (C.M.A. 1983); accord *United States v. Nichols*, 13 M.J. 154 (C.M.A. 1982) (The military judge can not assume facts adverse to the accused and thereby put the burden on the accused to testify. Trial counsel introduced an Article 15 for "possession of a controlled substance." The military judge improperly inferred that the drugs possessed were the most serious type unless the defense enlightened him to the contrary.); *United States v. Laws*, SPCM 18750 (A.C.M.R. 20 June 1983) (the military judge can't force the accused to authenticate documents).

<sup>158</sup>*United States v. Spivey*, 10 M.J. 7 (C.M.A. 1980); *United States v. Mathews*, 6 M.J. 357 (C.M.A. 1979). The Court of Military Appeals relied on *Estelle v. Smith*, 451 U.S. 454 (1981), to specifically overrule these decisions in *United States v. Sauer*, 15 M.J. 113 (C.M.A. 1983).

<sup>159</sup>*United States v. Cowles*, 16 M.J. 467 (C.M.A. 1983) (the prohibition against a military judge inquiry applies to guilty plea cases as well as contested cases).

<sup>160</sup>See *supra* notes 47, 48 and accompanying text. The Court of Military Appeal's reluctance to endorse broad use of the stipulation of fact is probably misplaced at least insofar as the government may want the accused to stipulate to past nonjudicial punishment which was administered in full compliance with applicable regulations. The trial counsel would not be forcing the accused to forego objection to inadmissible evidence but would be merely saving the time and expense required to produce an admissible copy of the document.

<sup>161</sup>Mil. R. Evid. 106; R.C.M. 1001(b)(2) ("If the accused objects to a particular document as inaccurate or incomplete in a specified respect . . . the matter shall be determined by the military judge").

objection, can compel the trial counsel to present any other specifically designated documents contained in the same personnel file.<sup>161</sup> The Air Force Court of Military Review has indicated that the military trial judge may *sua sponte* order the presentation of relevant personnel documents even if counsel don't intend to introduce any.<sup>162</sup>

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<sup>161</sup>United States v. Salgado-Agosto, 20 M.J. 238 (C.M.A. 1985); United States v. Morgan, 15 M.J. 128 (C.M.A. 1983); United States v. Goodwin, 21 M.J. 949 (A.F.C.M.R. 1986).

In *Salgado-Agosto* the Court of Military Appeals reaffirmed their rule of completeness announced in *Morgan*. The court noted that the presentencing procedures interpreted in *Morgan* (MCM, 1969, para. 75) were changed in R.C.M. 1001(b)(2), MCM, 1984, but then went on to hold that Mil. R. Evid. 106 provides an independent basis for the rule of completeness. Mil. R. Evid. 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it (emphasis supplied)." *Salgado-Agosto* and *Morgan* make the entire personnel file a "writing" under Mil. R. Evid. 106. *Salgado-Agosto*, 20 M.J. at 239.

The Air Force Court of Military Review applied the rule of completeness in *Goodwin*. In *Goodwin* the trial counsel introduced a letter of reprimand as part of the case in aggravation. The defense counsel objected, demanding that the government also introduce the accused's efficiency reports. The trial judge denied the defense motion based on the drafter's analysis to R.C.M. 1001(b)(2). The appellate court reversed based on *Salgado-Agosto*. So long as the accused specifies what favorable documents they want introduced the trial counsel must either offer the "complete" personnel file or forego admission of the pro-government personnel documents. *Goodwin*, 21 M.J. at 951.

To get relief the objecting party must specify, by an offer of proof or otherwise, which documents favorable to their side they want included in the personnel file received into evidence. *Salgado-Agosto*, 20 M.J. at 239; United States v. Davis, SPCM 21064 (A.C.M.R. 16 Dec. 1985).

<sup>162</sup>United States v. Robbins, 16 M.J. 736 (A.F.C.M.R. 1983); United States v. Smith, 16 M.J. 694 (A.F.C.M.R. 1983); United States v. Hergert, ACM 23974 (A.F.C.M.R. 23 Sept. 1983).

The *Smith* case involved an accused in the grade of lieutenant colonel. The military trial judge asked counsel for both sides whether the accused's efficiency reports would be introduced into evidence. Trial counsel declined to introduce the reports so the defense counsel introduced them during the case in extenuation and mitigation. Trial counsel was then permitted to offer other acts of uncharged misconduct during the government case in rebuttal. On appeal the defense argued that the trial judge should have compelled the trial counsel to introduce the efficiency reports and thereafter should have precluded the trial counsel from rebutting matters contained in the reports. The Air Force Court of Military Review held that *Morgan* does not give the trial judge authority to compel the trial counsel to present the accused's personnel file. Introduction of such matters by the trial counsel is discretionary and *Morgan* only applies once the trial counsel decides to introduce an incomplete portion of the personnel file. The Court also went on to note that *Morgan* encourages gamesmanship which may result in the sentencing authority receiving an incomplete and inaccurate picture of the accused's service record. According to the Air Force Court of Military Review the solution is for the trial judge to direct trial counsel to provide the court with the accused's efficiency reports and allow the trial counsel to present any relevant rebuttal evidence. *Smith*, 16 M.J. at 706.



Although the rule of completeness cases have involved objections to aggravation evidence the rule probably applies to the introduction of defense evidence as well. There are two practical consequences of invoking this rule of completeness at trial. First, the party forced to introduce documents favorable to their opponent is deprived of the opportunity to rebut those documents.<sup>163</sup> Second, if the offering party does not have the entire file available at trial they may be faced with the tactical dilemma of taking a delay in the trial or foregoing introduction of their own documents.

#### 5. *Matters in aggravation.*

Regardless of the accused's plea,<sup>164</sup> after findings of guilty the trial counsel may present evidence that is directly related to the circumstances surrounding the offense and evidence concerning the repercussions of the offense.<sup>165</sup> It is useful to think of these as two separate and distinct theories of admissible aggravation evidence. Each is the subject of current case law development portending greatly expanded opportunities for the trial counsel to bring uncharged misconduct to the the attention of the sentencing authority.

The proper methodology for analyzing the admissibility of matters in aggravation involves a three-step inquiry.<sup>166</sup> First, does the offered evidence involve a circumstance directly relating to

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In *Robbins* the defense counsel asked the trial judge to compel the trial counsel to introduce the accused's performance reports or in the alternative to make them court exhibits. The Air Force Court of Military Review reiterated its view in *Smith* that as a matter of policy the sentencing authority should have all relevant information available. The court seemingly retreated from its position in *Smith* which intimated that the trial judge has authority to compel the introduction of official personnel documents relevant to sentencing. Instead the court recommended that applicable regulations mandate the introduction of efficiency reports. *Robbins*, 16 M.J. at 740.

Finally, in *Hergert* the court cited both *Smith* and *Robbins* for the proposition that "the military judge may require either counsel to . . . [introduce the accused's efficiency or performance reports] . . . even in the absence of other evidence from the personnel records." *Hergert*, slip op. at n. 3.

<sup>163</sup>United States v. Salgado-Agosto, 20 M.J. 238 (C.M.A. 1985); United States v. Morgan, 15 M.J. 128 (C.M.A. 1983); United States v. Goodwin, 21 M.J. 949 (A.F.C.M.R. 1986).

<sup>164</sup>United States v. Vickers, 13 M.J. 403 (C.M.A. 1982).

<sup>165</sup>R.C.M. 1001(b)(4) ("Trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty").

<sup>166</sup>United States v. Martin, 20 M.J. 227, 230 n.5 (C.M.A. 1985); United States v. Wright, 20 M.J. 518 (A.C.M.R. 1985); United States v. Pooler, 18 M.J. 832 (A.C.M.R. 1984).

the charged offense or a repercussion of the charged offense?<sup>167</sup> Second, is the evidence offered in a form admissible under the Military Rules of Evidence (e.g., non-hearsay, proper authentication, qualified expert opinions, etc.)?<sup>168</sup> Finally, does the offered evidence satisfy the balancing test of Mil. R. Evid. 403?<sup>169</sup> In applying the balancing test the court should weigh the probative value of the evidence in proving a valid sentencing consideration against the prejudicial effect of the evidence.<sup>170</sup> Valid sentencing considerations include the relative seriousness of the charged offense,<sup>171</sup> the rehabilitative potential of the accused,<sup>172</sup> and the need to deter the accused from future misconduct.<sup>173</sup>

Many recent cases are confusing because they use language which blurs this three-step methodology.<sup>174</sup> Evidence which shows

<sup>167</sup>United States v. Witt, 21 M.J. 637 (A.C.M.R. 1985). Cf. United States v. Arceneaux, 21 M.J. 571 (A.C.M.R. 1985) (the first step is to determine if the evidence is relevant, "i.e., is the evidence important to a determination of a proper sentence").

<sup>168</sup>Mil. R. Evid. 1101. The Military Rules of Evidence apply to all aspects of the court-martial except those specifically excluded in Mil. R. Evid. 1101. The presentencing case in aggravation is not exempt from coverage.

<sup>169</sup>United States v. Martin, 20 M.J. 227 (C.M.A. 1985); United States v. Witt, 21 M.J. 637 (A.C.M.R. 1985).

Mil. R. Evid. 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The military trial judge can *sua sponte* apply the Mil. R. Evid. 403 balancing test but is only required to apply the test when the defense objects to the offered evidence. United States v. Witt, 21 M.J. 637 (A.C.M.R. 1985); United States v. Green, 21 M.J. 633 (A.C.M.R. 1985).

<sup>170</sup>United States v. Martin, 20 M.J. 227 (C.M.A. 1985). During the presentencing proceeding, the only issue remaining in the trial is the determination of an appropriate sentence for the accused. The relevance of evidence offered at that stage of the court-martial must be measured in terms of its probative value in proving or disproving a proper sentencing consideration.

<sup>171</sup>See, e.g., United States v. Sargent, 18 M.J. 331 (C.M.A. 1984); United States v. Vickers, 13 M.J. 403 (C.M.A. 1982).

<sup>172</sup>See, e.g., United States v. Martin, 20 M.J. 227, 230 n.4 (C.M.A. 1985) ("[T]he purpose of the presentencing portion of a court-martial is to present evidence of the relative 'badness' and 'goodness' of the accused as the primary steps toward assessing an appropriate sentence."); United States v. Wright, 20 M.J. 518 (A.C.M.R. 1985) (sentencing evidence is relevant if "it provides insight into the accused's rehabilitative potential, the danger he poses to society, and the need for future deterrence"); United States v. Pooler, 18 M.J. 832 (A.C.M.R. 1984).

<sup>173</sup>United States v. Wright, 20 M.J. 518 (A.C.M.R. 1985); United States v. Pooler, 18 M.J. 832 (A.C.M.R. 1984); United States v. Garcia, 18 M.J. 716 (A.F.C.M.R. 1984).

<sup>174</sup>Court of military review decisions typically take a shotgun approach, citing multiple grounds to support admissibility without applying a clear methodology. See, e.g., United States v. Green, 21 M.J. 633 (A.C.M.R. 1985); United States v.

the accused has no rehabilitative potential is not independently admissible as aggravation evidence unless it involves a circumstance surrounding the offense or a repercussion of the offense.<sup>175</sup> At the presentencing stage of the trial a broader spectrum of evidence becomes relevant because of the broad range of valid sentencing considerations but the Military Rules of Evidence governing the form of the evidence are not relaxed during the case in aggravation.<sup>176</sup> Trial counsel should understand this three-step methodology and be able to articulate a theory of admissibility.

The courts have been innovative in defining the "circumstances directly relating to the offense." The phrase encompasses much more than a factual rendition of how the charged offense was committed or factual details about the offense which were not pled or proven during findings (such as the street value of the illegal drugs possessed<sup>177</sup> or the black market value of merchandise possessed in violation of regulations<sup>178</sup>). Instead, the "circumstances directly relating to the offense" may include collateral matters indirectly related to the charged offenses and uncharged misconduct which circumstantially relates to the accused's state of mind regarding the charged offenses.

When the trial counsel attempts to introduce an expansive factual account of the events leading up to the charged offense the court must draw a line between circumstances directly relating to the offense and circumstances which only indirectly or tangentially relate to the offense. This issue most commonly arises in drug offenses. In a typical drug case the accused sells illegal drugs to a confidential informant or covert agent. The sale is generally accompanied by negotiations and perhaps a series of

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Arceneaux, 21 M.J. 571 (A.C.M.R. 1985); *United States v. Harrod*, 20 M.J. 777 (A.C.M.R. 1985).

<sup>175</sup>R.C.M. 1001(b)(5) permits the introduction of *opinion* testimony concerning the accused's rehabilitative potential. Rehabilitative potential is not an independent ground for admitting specific acts of misconduct unless the defense first opens the door by exploring specific acts of conduct during cross-examination. *Cf. United States v. Arceneaux*, 21 M.J. 571 (A.C.M.R. 1985); *United States v. Chapman*, 20 M.J. 717 (N.M.C.M.R. 1985), *petition for review granted*, 21 M.J. 306 (C.M.A. 1986).

<sup>176</sup>Mil. R. Evid. 1101. *But cf. United States v. Martin*, 20 M.J. 227, 230 n.5 (C.M.A. 1985) ("An appropriate analysis of proffered government evidence on sentencing is first to determine . . . then is the proffered evidence admissible under either the Military Rules of Evidence or the more relaxed rules for sentencing").

<sup>177</sup>*See, e.g., United States v. Witt*, 21 M.J. 637, 640 (A.C.M.R. 1985) ("In interpreting what type of evidence is 'directly related to' a given offense, this court will liberally construe R.C.M. 1001(b)(4)").

<sup>178</sup>*United States v. Hood*, 12 M.J. 890 (A.C.M.R. 1982).

otherwise "innocent" informal contacts designed to cultivate a relationship of trust. During these discussions the accused often admits past uncharged drug transactions and expresses a willingness to engage in future illegal transactions. In addition, the trial counsel will frequently have other evidence of uncharged drug offenses. The trial counsel obviously would like to have this uncharged misconduct admitted in aggravation as a circumstance directly relating to the charged offenses.

The court decisions which address this issue tend to be fact specific and fail to set out precise guidance on when drug negotiations and other evidence of uncharged drug offenses are admissible aggravation evidence.<sup>179</sup> There are at least four different rationales which can be used to admit such evidence: (1) the statements themselves are *res gestae*; (2) the uncharged misconduct is *res gestae*; (3) the statements or uncharged misconduct is admissible to prove motive; (4) the statements or uncharged misconduct is admissible to show the accused's attitude toward the charged offenses. The common thread to each theory necessarily must be that the offered evidence is a circumstance directly relating to the charged offense.

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<sup>179</sup>Compare *United States v. Reynolds*, CM 444270 (A.C.M.R. 29 Feb. 1984) with *United States v. Acevedo*, CM 444146 (A.C.M.R. 14 May 1984); *United States v. Harris*, CM 444086 (A.C.M.R. 27 Dec. 1983); *United States v. Van Boxel*, SPCM 18605 (A.C.M.R. 9 Sept. 1983); and *United States v. Farwell*, SPCM 18791 (A.C.M.R. 15 July 1983).

In *Reynolds*, the accused pled guilty to possession and distribution of marijuana. As aggravation, the Government introduced the testimony of the undercover agent who negotiated the charged distribution. The agent testified that during the negotiations the accused said he could not reduce his price because he had already sold some marijuana earlier that day at the offered price. When the agent inquired about possible future sales, the accused stated he shortly would be picking up a large quantity of marijuana and could sell the agent a quarter pound for \$175. The court held that because these statements were made during the negotiations concerning the charged offenses, they were *res gestae* inextricably related in time and place to the charged offense.

In *Acevedo*, the accused also pled guilty to possession and distribution of marijuana. During presentencing, the trial counsel introduced two statements the accused made outlining his role as a drug dealer over a five-month period of time. The court held that because the statements were general and provided no direct nexus with the charged offense they were not admissible as *res gestae*. It is not clear whether these statements would have been admissible if the trial counsel had made it clear that the charged offenses occurred during the five-month period of drug dealing mentioned in the statements or if the accused's statements had been made contemporaneous with the negotiations concerning the charged offenses.

In *Van Boxel*, the accused pled guilty to possession and sale of LSD. The government aggravation evidence consisted of testimony that at the time the charged offenses occurred the accused expressed a willingness to sell LSD at some undisclosed future time. The court held that this was inadmissible aggravation concerning uncharged misconduct unrelated to the charged offense.

The accused's statements are admissible as *res gestae* if they are inextricably related in time and place to the commission of the charged offense or to the negotiated arrangements leading to the charged offense.<sup>180</sup> General negotiations, statements made during the course of social contacts designed to cultivate trust between the accused and the agent, or statements made by the accused after apprehension are not admissible using this *res gestae* theory.<sup>181</sup>

If the accused's statements were not *res gestae* they may nevertheless be admissible if the misconduct itself occurred contemporaneously with the charged offense and was part of the overall criminal scheme which included the charged offense.<sup>182</sup> The key to admissibility under this theory is the relation in time and place between the uncharged misconduct and the charged offense as well as the similarity of the criminal activity.

Prior to 1985 there was disagreement among the courts of review about whether uncharged misconduct, which would have been admissible for a limited purpose during the case-in-chief, is

<sup>180</sup>See, e.g., *United States v. Doss*, SPCM 19552 (A.C.M.R. 5 Mar. 1984) (After the accused sold the drugs he told the agent "he would have more to sell on Friday." This uncharged misconduct was admissible because the statement was very specific in nature, and was contemporaneous with the charged offense); *United States v. Carfang*, 19 M.J. 739 (A.F.C.M.R. 1984) (During negotiations with an undercover agent and a confidential informant, the accused stated he was able to get "coke," "grass," "speed," and "acid." These statements were so closely intertwined with the charged offense as to be part and parcel of the entire chain of events); *United States v. Keith*, 17 M.J. 1078 (A.F.C.M.R. 1983) (during preliminary negotiations which eventually lead to the charged cocaine sale the accused told the agent that he knew of terrorist groups who would be willing to purchase stolen military night vision goggles).

<sup>181</sup>See *supra* note 179.

<sup>182</sup>*United States v. Vezo*, CM 447428 (A.C.M.R. 25 Mar. 1986) (Sergeant Vezo was convicted of wrongful distribution of marijuana on 20 November 1984, 11 December 1984, and 4 January 1985. In a pretrial confession the accused admitted he had distributed marijuana to members of his unit on other occasions between early November 1984 and the time he was apprehended on 12 January 1985. The court held that this uncharged misconduct "occurred contemporaneously with the charged sales and were part of his overall criminal scheme which included those sales of which he was found guilty. Thus, the uncharged sales were directly related to the charged sales").

*United States v. Gober*, CM 447009 (A.C.M.R. 7 Oct. 1985) (Private Gober was convicted of larceny, forgery, blackmarketing, possession of a controlled substance, and absence without leave. In aggravation the trial counsel introduced a stipulation of fact describing uncharged misconduct—sale of controlled substances to other soldiers and blackmarketing liquor. The uncharged misconduct was directly related to the charged offenses because the accused used the same ration control plate to purchase the liquor and the charged blackmarket items; he possessed the controlled substance so he could sell it; and he used the proceeds from these uncharged, illegal activities to finance the charged absence without leave).

admissible for the first time during presentencing pursuant to Mil. R. Evid. 404(b).<sup>183</sup> In a contested case uncharged misconduct admitted for a limited purpose during the case-in-chief can be considered by the sentencing authority in deciding an appropriate sentence.<sup>184</sup> Some court of review judges reasoned that in a guilty plea case the sentencing authority should have no less information available and hence uncharged misconduct is automatically admissible during presentencing if the evidence would have been admissible during the merits pursuant to Mil. R. Evid. 404(b).<sup>185</sup> Other court of review judges took the opposite position, holding that uncharged misconduct which would have been admissible for a limited purpose during the case-in-chief is never admissible during presentencing of a guilty plea case because the only purpose of such evidence is to show that the accused is a bad person.<sup>186</sup>

The Court of Military Appeals resolved the issue in *United States v. Martin*<sup>187</sup> by applying a three-step methodology.<sup>188</sup> The first step is to determine whether the uncharged misconduct is a circumstance directly relating to the offense. If the uncharged misconduct tends to prove the accused's state of mind at the time of the offense arguably it is a circumstance directly relating to the charged offense. The second step is to ensure that the offered

<sup>183</sup>*Compare* *United States v. Taliaferro*, 2 M.J. 397 (A.C.M.R. 1975); *United States v. Silva*, 19 M.J. 501 (A.F.C.M.R. 1984); *United States v. Keith*, 17 M.J. 1078 (A.F.C.M.R. 1983); *United States v. Martin*, 17 M.J. 899 (A.F.C.M.R. 1983); and *United States v. Potter*, 46 C.M.R. 529 (N.C.M.R. 1972) with *United States v. Harrod*, 20 M.J. 777 (A.C.M.R. 1985); and *United States v. Thill*, CM 444507 (A.C.M.R. 13 July 1984).

<sup>184</sup>R.C.M. 1001(f)(2).

<sup>185</sup>*See, e.g.*, *United States v. Harrod*, 20 M.J. 777 (A.C.M.R. 1985).

<sup>186</sup>*See, e.g.*, *United States v. Silva*, 19 M.J. 501 (A.F.C.M.R. 1984); *United States v. Martin*, 17 M.J. 899 (A.F.C.M.R. 1983).

<sup>187</sup>20 M.J. 227 (C.M.A. 1985); accord *United States v. Silva*, 21 M.J. 336 (C.M.A. 1986). But see *United States v. Green*, 21 M.J. 633 (A.C.M.R. 1985) (The Army Court of Military Review sanctioned the admissibility of uncharged misconduct during sentencing because it would have been admissible on the merits pursuant to Mil. R. Evid. 404(b) even though the Court of Military Appeals had rejected that approach four months earlier in *Martin*).

<sup>188</sup>In *Martin*, Judge Cox described the proper methodology as follows:

An appropriate analysis of proffered government evidence on sentencing is first to determine if the evidence tends to prove or disprove the existence of a fact or facts permitted by the sentencing rules . . . If the answer is yes, then is the proffered evidence admissible under either the Military Rules of Evidence or the more relaxed rules for sentencing . . . Of course, the military judge must apply the Mil. R. Evid. 403 test to determine if the prejudicial effect of the evidence outweighs the probative value.

*Martin*, 20 M.J. at 230 n.5.



evidence is in a form admissible under the Military Rules of Evidence. Finally, the evidence should be tested for relevance by applying the balancing test of Mil. R. Evid. 403. The accused's motive for committing the crime will generally be a relevant sentencing consideration helpful in understanding the relative seriousness of the crime, assessing the rehabilitative potential of the accused, and predicting the likelihood of future misconduct.<sup>189</sup> The potential prejudice to the accused lies in the possibility that the sentencing authority will improperly punish the accused for the acts of uncharged misconduct. In each case the balancing test is properly left to the sound discretion of the trial judge.<sup>190</sup>

Finally, a number of recent Army Court of Military Review decisions have ruled that uncharged misconduct is admissible aggravation evidence if it is probative of the accused's attitude toward the charged offense.<sup>191</sup> These cases employ a two-step

<sup>189</sup>In *Martin*, Chief Judge Everett illustrates the application of these standards to a drug distribution case by opining that it would be helpful to "the sentencing authority to learn whether the accused distributed the drug to a friend as a favor or whether he did so as part of a large business that he operated." *Martin*, 20 M.J. at 232.

It is important to note that when the military trial judge applies the Mil. R. Evid. 403 balancing test "the probative value" of the evidence refers to the tendency of the evidence to prove a valid sentencing matter *not* just the tendency of the evidence to prove one of the items listed in Mil. R. Evid. 404(b). For example, evidence of uncharged misconduct tending to prove "motive" may be relevant to deciding an appropriate sentence but uncharged misconduct which tends to prove "opportunity to commit the offense" will not generally be relevant during sentencing. *Cf. United States v. Harrod*, 20 M.J. 777 (A.C.M.R. 1985).

<sup>190</sup>*United States v. Martin*, 20 M.J. 227, 230 (C.M.A. 1985) (military trial judges exercise their discretion in applying Mil. R. Evid. 403 balancing test; courts of military review can substitute their own balancing if the trial judge abused their discretion); *United States v. Witt*, 21 M.J. 637, 642 (A.C.M.R. 1985) (accused have the burden of going forward with conclusive arguments that trial judges abused their discretion in applying the balancing test).

<sup>191</sup>*United States v. Wright*, 20 M.J. 518 (A.C.M.R. 1985); *United States v. Pooler*, 18 M.J. 832 (A.C.M.R. 1984).

In *Wright*, the accused pled guilty to distribution and attempted distribution of cocaine. During presentencing the trial counsel offered the record of trial from the accused's prior court-martial, where he was convicted of marijuana offenses. The record of trial included portions in which the accused expressed remorse for his drug involvement and the military judge admonished the accused that he was being given a second chance to make it as a soldier. The Army Court of Military Review specifically declined to apply an overly restrictive definition to the phrase "evidence directly related to the offense for which an accused has been convicted" and instead held that "an accused's attitude toward his offense is a *fortiori* related to that offense and is relevant in determining an appropriate sentence as it provides insight into the accused's rehabilitative potential, the danger he poses to society, and the need for future deterrence." *Wright*, 20 M.J. at 520.

In *Pooler*, the accused pled guilty to possession and distribution of marijuana. In aggravation the government introduced testimony that the accused was willing to engage in a future drug transaction. The court upheld the admissibility of this uncharged misconduct based on the following rationale:

theory of relevance. First, the accused's attitude toward the charged offense is a circumstance directly related to the offense. Second, evidence that the accused committed *similar* offenses in the past or expressed a willingness to commit *similar* offenses in the future is circumstantial evidence probative of the accused's attitude toward the charged offense.<sup>192</sup>

This theory of aggravation can be used to bring a great deal of uncharged misconduct to the attention of the sentencing authority. The key limitations on admissibility are that the uncharged misconduct must be similar to the charged offense,<sup>193</sup> the evidence offered must be in an admissible form,<sup>194</sup> and the probative value of the evidence must outweigh its prejudicial effect.<sup>195</sup>

In the typical drug case the admissions the accused makes during the negotiations leading up to the drug sale will be admissible to show that the accused's attitude toward illegal drugs demonstrates a lack of rehabilitative potential and a substantial likelihood of future drug involvement necessitating lengthy incarceration.

During the case in aggravation the trial counsel also can present evidence concerning the repercussions of the charged offense.<sup>196</sup> The drafters of the 1984 Manual encouraged an expansive interpretation for victim impact evidence providing that:

Evidence in aggravation may include evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense

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A criminal state of mind is a fundamental component of our society's definition of crime... it follows that a person's attitude toward the crime of which he has been convicted is directly related to that offense. Evidence of the offender's attitude toward similar offenses, past or future, is reliable circumstantial evidence, and often the only available evidence, on this issue... the relevance to the sentencing process of an offender's attitude toward his offense can hardly be exaggerated.... [It affects the]... rehabilitation of the offender, protection of society from the offender, and deterrence of the offender.

*Pooler*, 18 M.J. at 833.

<sup>192</sup>*United States v. Wright*, 20 M.J. 518, 521 (A.C.M.R. 1985) ("[W]e do not suggest that sentencing authorities may consider information similar to the type at issue from a trial involving a different and unrelated offense").

<sup>193</sup>*United States v. Wright*, 20 M.J. 518 (A.C.M.R. 1985); *United States v. Pooler*, 18 M.J. 832 (A.C.M.R. 1984). If the accused is convicted of a drug related offense, any other drug related offense is probably "similar" even if it involves a different category of drug or a different type of transaction.

<sup>194</sup>Mil. R. Evid. 1101(a).

<sup>195</sup>Mil. R. Evid. 403.

<sup>196</sup>*United States v. Vickers*, 13 M.J. 403 (C.M.A. 1982).

committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense.<sup>197</sup>

The appellate courts have been liberal in sanctioning a wide variety of evidence in each of the areas cited in the Manual.<sup>198</sup> "Financial impact" can include anything from the hospital costs paid by the victim of an assault,<sup>199</sup> to evidence establishing the black market value of items illegally possessed overseas.<sup>200</sup> "Social impact" can include either specific past impacts—such as testimony concerning the loss felt by a family or community for a homicide victim,<sup>201</sup> or potential impacts—such as expert testimony concerning the general effects of rape trauma on a rape victim's social life.<sup>202</sup> "Psychological impact" can include mental anguish felt by a victim,<sup>203</sup> by a victim's family,<sup>204</sup> by a victim's community,<sup>205</sup> or by a victim's military unit.<sup>206</sup> Mental trauma suffered by a victim can include the indignity and humiliation the victim experienced by having to testify at trial.<sup>207</sup> "Medical impact" includes actual injuries others suffer as a result of the accused's charged offenses<sup>208</sup> and evidence concerning the potential for such injuries.<sup>209</sup> Finally, the courts recognize that many

<sup>197</sup>R.C.M. 1001(b)(4) discussion.

<sup>198</sup>See, e.g., *United States v. Harrod*, 20 M.J. 777 (A.C.M.R. 1985).

<sup>199</sup>R.C.M. 1001(b)(4) discussion.

<sup>200</sup>*United States v. Hood*, 12 M.J. 890 (A.C.M.R. 1982) (permissible aggravation included "expert" CID testimony that the accused could double or triple his money by selling the illegally possessed goods on the black market).

<sup>201</sup>*United States v. Pearson*, 17 M.J. 149 (C.M.A. 1984). While aggravation evidence properly includes the impact of the crime on the victim or the victim's family the sentencing authority cannot impose a punishment to satisfy the desires of others.

<sup>202</sup>*United States v. Hammond*, 17 M.J. 218 (C.M.A. 1984).

<sup>203</sup>*United States v. Marshall*, 14 M.J. 157 (C.M.A. 1982) (psychological evidence concerning the long term residual effects the rape is likely to have on the victim); *United States v. Body*, CM 446257 (A.C.M.R. 8 Apr. 1985) (mental anguish and suffering of child victim who had been raped and sodomized).

<sup>204</sup>*United States v. Pearson*, 17 M.J. 149 (C.M.A. 1984) (impact that death of child due to accused's negligent homicide had on the victim's family members).

<sup>205</sup>*Id.*

<sup>206</sup>*Id.*

<sup>207</sup>*United States v. Garcia*, 18 M.J. 716 (A.F.C.M.R. 1984).

<sup>208</sup>*United States v. Sargent*, 18 M.J. 331 (C.M.A. 1984) (drug purchaser's drug overdose death resulting from the accused's sale or transfer of illegal drugs).

<sup>209</sup>*United States v. Witt*, 21 M.J. 637 (A.C.M.R. 1985) (expert testimony concerning the potential psychiatric consequences of taking LSD); *United States v. Logan*, 13 M.J. 821 (A.C.M.R. 1982) (evidence that the "Talwin" illegally possessed by the accused in violation of regulations was a dangerous drug commonly used as a heroin substitute); *United States v. Needham*, 19 M.J. 614 (A.F.C.M.R. 1984) (Dep't of Justice periodical tracing the history, use, and physical/psychological effects of illegal drugs); *United States v. Corl*, 6 M.J. 914

crimes directly<sup>210</sup> and indirectly<sup>211</sup> impact on the military unit's discipline and mission.

There must be a reasonable connection between the accused's offense and the alleged impact but it is not necessary to show that the impact was foreseeable. "Repercussions of an offense" are admissible in aggravation if the accused's misconduct "reasonably can be shown to have contributed to those effects."<sup>212</sup>

*6. Opinion evidence of rehabilitative potential and past duty performance.*

As part of the case in aggravation the trial counsel can present opinion testimony concerning the character of the accused's past duty performance and the accused's rehabilitative potential.<sup>213</sup> The trial counsel cannot explore specific incidents of misconduct during direct examination but if the defense inquires into specific instances of conduct during cross-examination the "door would be open" for the trial counsel to explore specific incidents of misconduct during re-direct.<sup>214</sup> Witnesses cannot express an opinion that the accused has no rehabilitative potential based solely on the seriousness of the charged offense.<sup>215</sup> Lack of personal contact with the soldier affects the weight which may be given the opinion testimony but there are some situations when even evidence of minimal weight may be critical. If the accused is convicted of a serious felony and the entire chain of command from company commander down is going to testify on extenuation

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(N.C.M.R. 1979) (Evidence of psychological and physiological effects of drug illegally sold).

<sup>210</sup>United States v. Vickers, 13 M.J. 403 (C.M.A. 1982) (the effects that the accused's charged disobedience of orders had in exacerbating a larger disruption).

<sup>211</sup>United States v. Fitzhugh, 14 M.J. 595 (A.F.C.M.R. 1982) (effect that the accused's removal from the Personnel Reliability Program had on the unit's military mission). Cf. United States v. Caro, 20 M.J. 770 (A.F.C.M.R. 1985) (fact that the accused lied about his involvement in criminal activity was not admissible to show that the investigative agency had to expend additional resources to solve the crime).

<sup>212</sup>United States v. Witt, 21 M.J. 637 (A.C.M.R. 1985). In *Witt*, the accused was convicted of unlawfully distributing LSD. During presentencing, the trial counsel introduced evidence that one of the soldiers who ingested the accused's LSD went wild and stabbed other soldiers with a knife. The court held that, although the accused should not be "held responsible" for a never-ending chain of repercussions from the sale of LSD, it is proper for the government to introduce evidence of repercussions which are reasonably linked to the accused's offense. The foreseeability of the repercussions is irrelevant.

<sup>213</sup>R.C.M. 1001(b)(5).

<sup>214</sup>*Id.* Obviously the military judge has broad discretion in limiting collateral inquiries into specific instance of conduct.

<sup>215</sup>United States v. Horner, 22 M.J. 294 (C.M.A. 1986) (opinions about rehabilitative potential are not helpful to the sentencing authority unless they are linked to the accused's character as an individual).

and mitigation that they want the accused back in the unit trial counsel may be able to preempt the impact of that evidence by calling the battalion and brigade commanders to give their opinion about the accused's rehabilitative potential.

## V. THE DEFENSE CASE IN EXTENUATION AND MITIGATION

If some trial counsel have a general tendency to underprepare the sentencing portion of the case, most trial counsel totally abdicate their adversarial role during the defense case in extenuation and mitigation. While it is true that a clever defense counsel can limit the trial counsel's participation during this phase of the proceeding it is not a time to relax. The trial counsel must insure that the defense does not exceed the bounds of permissible extenuation and mitigation and should be prepared to take advantage of "open doors" through cross-examination and rebuttal.

### A. EVIDENCE ADMISSIBLE

After a finding of guilty the defense may present matters in "extenuation and mitigation" to be considered by the sentencing authority.<sup>216</sup> Matters in extenuation are those matters which serve to explain the circumstances surrounding the commission of an offense.<sup>217</sup> Mitigation evidence relates to the accused's character and those aspects of the individual which indicate that sentence leniency is warranted.<sup>218</sup>

The rules of evidence are generally relaxed for the defense presentation of the case in extenuation and mitigation.<sup>219</sup> The military trial judge has discretion in relaxing the rules of evidence and should not admit evidence which is irrelevant or has no indicia of reliability.<sup>220</sup> The trial judge's discretion to exclude

<sup>216</sup>R.C.M. 1001(c)(1). The trial judge should advise the accused of the right to present witnesses and documents in extenuation and mitigation. R.C.M. 1001(a)(3).

<sup>217</sup>R.C.M. 1001(c)(1)(A). See, e.g., *United States v. King*, SPCM 20994 (A.C.M.R. 29 Aug. 1985) (error for the trial judge to prevent the defense from presenting evidence concerning the accused's blood-alcohol level as extenuation evidence).

<sup>218</sup>R.C.M. 1001(c)(1)(B). See, e.g., *United States v. Taylor*, 21 M.J. 840 (A.C.M.R. 1986) (defense is entitled to present competent evidence regarding the effect a particular sentence or punishment will have on the accused and can elicit testimony bearing on the accused's propensity or lack of propensity for similar misconduct).

<sup>219</sup>R.C.M. 1001(C)(3) provides that this may include admitting "letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability."

<sup>220</sup>*United States v. Elvine*, 16 M.J. 14 (C.M.A. 1983) (evidence that a rape victim resumed normal sex life was not admissible to create an inference that she suffered no rape trauma); *United States v. Meade*, 19 M.J. 894 (A.C.M.R. 1985) (military

extenuation and mitigation evidence should be very carefully exercised in capital cases.<sup>221</sup> If the rules are relaxed for the defense, e.g., to allow the consideration of affidavits or letters to the court, the military judge has the discretion to similarly relax the rules of evidence for trial counsel's rebuttal.<sup>222</sup>

The military judge must personally advise the accused of the right to present matters in extenuation and mitigation including the rights of allocution.<sup>223</sup> The accused may make a sworn

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judge properly excluded letters of transmittal which showed subordinate commanders recommended a lower level court-martial).

<sup>221</sup>United States v. Matthews, 16 M.J. 354, 378 (C.M.A. 1983) ("The accused has unlimited opportunity to present mitigating and extenuating evidence").

<sup>222</sup>R.C.M. 1001(d). Note that this provision does not authorize the relaxation of the rules of evidence for the prosecution's case in aggravation. For examples of relaxed rules on rebuttal see United States v. Stark, 17 M.J. 778 (A.F.C.M.R. 1983); United States v. Wyronzynski, 7 M.J. 900 (A.F.C.M.R. 1979).

<sup>223</sup>R.C.M. 1001(a)(3); United States v. Hawkins, 2 M.J. 23 (C.M.A. 1976) (prejudicial error was committed when the trial judge failed to advise the accused of any of his allocution rights and the accused made no statements during sentencing); United States v. Davis, 6 M.J. 969 (N.M.C.M.R. 1979) (prejudicial error was committed when the trial judge failed to advise the accused of any of his allocution rights and the accused's case was damaged by the cross-examination of his sworn sentencing testimony).

The appellate courts will find error when any portion of the allocution rights advice is omitted but the error will usually not be prejudicial and will not result in sentence reassessment. See United States v. Barnes, 6 M.J. 356 (C.M.A. 1979) (the trial judge failed to advise the accused about the right to remain silent but the accused made an unsworn statement which in no way prejudiced the sentence); United States v. Shelly, CM 446323 (A.C.M.R. 13 Feb. 1985) (the trial judge failed to advise the accused about the right to remain silent but the accused made an unsworn statement with the assistance of counsel which was obviously beneficial); United States v. Dumas, SPCM 18471 (A.C.M.R. 17 June 1985) (the trial judge failed to advise the accused about the right to remain silent but the accused was not prejudiced because his unsworn statement helped to mitigate his sentence); United States v. Robertson, 17 M.J. 846 (N.M.C.M.R. 1984) (the trial judge failed to advise the accused of any allocution rights but there was no prejudice where the defense strategy clearly required the accused to make a sworn statement and that strategy was employed at trial); United States v. Koek, 6 M.J. 540 (N.C.M.R. 1978) (trial judge erred in omitting advice concerning the rights of allocution but there was no prejudice where defense counsel asserted that he advised the accused of the rights and the rights were effectively exercised at trial); United States v. Walker, 4 M.J. 936 (N.C.M.R. 1978) (the trial judge erred in forgetting to advise the accused of the right to make an unsworn statement but there was no prejudice because the accused made an effective sworn statement); United States v. Annis, 2 M.J. 1100 (A.C.M.R. 1977) (the trial judge failed to advise the accused about the right to remain silent but the accused made a salutary unsworn statement and received a relatively lenient sentence).

The military judge must also personally advise the accused of the right to present witnesses and documents in extenuation and mitigation. R.C.M. 1001(a)(3); United States v. Davis, CM 447406 (A.C.M.R. 29 Jan. 1986) (the trial judge erred by omitting the instruction but there was no prejudice where the accused was advised of allocution rights, the accused made an unsworn statement, and the adjudged sentence was more lenient than the limitation contained in the pretrial agreement); United States v. Nelson, 21 M.J. 573 (A.C.M.R. 1985) (it was error to



statement, an unsworn statement,<sup>224</sup> or may remain silent.<sup>225</sup>

If the accused makes a statement under oath, he or she is subject to cross-examination within the scope of the direct examination.<sup>226</sup> The accused's sworn statement constitutes evidence and may be argued during closing arguments.<sup>227</sup> As a witness, the accused is subject to the same forms of impeachment applicable to other witnesses under the Military Rules of Evidence.<sup>228</sup>

The accused may also make an unsworn statement during presentencing.<sup>229</sup> This statement may be either written or oral<sup>230</sup> and may be made by the accused, the defense counsel, or both.<sup>231</sup> An unsworn statement does not constitute evidence and does not subject the accused to impeachment as a witness.<sup>232</sup> The accused may not be cross-examined by the military judge, the court members, or the trial counsel,<sup>233</sup> but the Government may rebut facts or inferences contained in the unsworn statement.<sup>234</sup> Normally the accused makes an unsworn statement from the witness stand, although the military judge may require such a statement to be made from counsel table. The military judge, absent defense waiver,<sup>235</sup> should instruct the court members that an unsworn statement is a legitimate form of testimony and that the

omit the advice but there was no prejudice where the accused was advised of his allocation rights and made an unsworn statement).

<sup>224</sup>R.C.M. 1001(c)(2).

<sup>225</sup>UCMJ art. 31(b). See also *United States v. Sauer*, 15 M.J. 113 (C.M.A. 1983).

<sup>226</sup>R.C.M. 611(b) provides the general rule regarding cross-examination: "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The military judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct."

The right to cross-examine the accused is generally limited in scope to preserve the accused's rights against self-incrimination. See Mil. R. Evid. 301(e); Mil. R. Evid. 608(b). For specific examples of the permissible scope of cross-examination see generally *United States v. Thomas*, 16 M.J. 899 (A.C.M.R. 1983); *United States v. Robideau*, 16 M.J. 819 (N.M.C.M.R. 1983).

<sup>227</sup>R.C.M. 1001(g).

<sup>228</sup>For a discussion of evidence admissible to attack the credibility of a witness see generally DA Pam 27-22.

<sup>229</sup>R.C.M. 1001(c)(2)(C).

<sup>230</sup>*Id.* But the accused may not submit a written sworn affidavit.

<sup>231</sup>*Id.*

<sup>232</sup>*United States v. Konarski*, 8 M.J. 146 (C.M.A. 1971); *United States v. Harris*, 13 M.J. 653 (N.M.C.M.R. 1982); *United States v. Shewmake*, 6 M.J. 710 (N.C.M.R. 1978); *United States v. McCurry*, 5 M.J. 502 (A.F.C.M.R. 1978).

<sup>233</sup>R.C.M. 1001(c)(2)(C); *United States v. King*, 12 C.M.A. 71, 30 C.M.R. 71 (1960).

<sup>234</sup>R.C.M. 1001(c)(2)(C). For examples of prosecution rebuttal of "inferences" created by the defense evidence see *United States v. Strong*, 17 M.J. 263 (C.M.A. 1984); *United States v. Konarski*, 8 M.J. 146 (C.M.A. 1979).

<sup>235</sup>For a discussion of defense waiver of protective instructions see DA Pam 27-173, para. 22-15.

accused's election to not make a sworn statement should not be considered adversely.<sup>236</sup>

Finally, the accused has the absolute right to remain silent during the sentencing phase of the trial.<sup>237</sup> Unless the defense waives the protective instruction,<sup>238</sup> the court members should be instructed not to draw any adverse inferences from the accused's silence.<sup>239</sup>

## B. LIMITATIONS ON DEFENSE EVIDENCE

Although the rules of evidence may be relaxed during the presentation of extenuation and mitigation evidence<sup>240</sup> they are not totally abandoned. The defense does not have an absolute right to present unlimited evidence during sentencing. The military judge has *the discretion* to relax the rules of evidence.<sup>241</sup> Trial counsel should be alert to defense attempts to present evidence which is irrelevant or unreliable.<sup>242</sup>

In guilty plea cases counsel should listen carefully to matters raised in extenuation and mitigation to insure that the plea is not improvidenced by the presentation of matters inconsistent with the plea.<sup>243</sup> Matters disclosed by the accused during the providence inquiry arguably are evidence<sup>244</sup> and can be considered by the sentencing authority without being re-introduced during the case in extenuation and mitigation. If the providence inquiry is treated as evidence, the trial counsel should be able to present impeachment and rebuttal evidence just as though the defense

<sup>236</sup>United States v. King, 12 C.M.A. 71, 30 C.M.R. 71 (1960); Benchbook, para. 2-37; accord United States v. Brown, 17 M.J. 987 (A.C.M.R. 1984) (It was improper for trial counsel to comment adversely on the accused's election to make an unsworn statement by saying "if... [the accused's testimony was true]... why not make a sworn statement?" The trial judge had a *sua sponte* duty to give a curative instruction).

<sup>237</sup>UCMJ art. 31(b).

<sup>238</sup>See *supra* note 191.

<sup>239</sup>Benchbook, para. 7-12.

<sup>240</sup>R.C.M. 1001(c)(3).

<sup>241</sup>R.C.M. 1001(c)(3) provides "The military judge *may*, with respect to matters in extenuation or mitigation or both, relax the rules of evidence" (emphasis supplied).

<sup>242</sup>See United States v. Elvine, 16 M.J. 14 (C.M.A. 1983); United States v. Meade, 19 M.J. 894 (A.C.M.R. 1985). But cf. United States v. Gonzalez, 16 M.J. 58 (C.M.A. 1983) (military judge abused his discretion in refusing to accept affidavits offered by the defense where his sole basis for exclusion was the trial counsel's oral assertion that the affiants had changed their opinions after they had been interviewed by him).

<sup>243</sup>See DA Pam 27-173, ch. 21.

<sup>244</sup>United States v. Holt, 22 M.J. 553 (A.C.M.R. 1986). But see discussion *supra* note 34.

had opened the door by presenting those matters during sentencing through the sworn statement of the accused.

During the case in extenuation and mitigation the defense may not re-litigate the court's prior findings of guilt,<sup>245</sup> they may not invade the province of the sentencing authority by presenting opinion testimony about what would be an appropriate sentence,<sup>246</sup> and they may not introduce evidence concerning court-martial sentences other accused received in separate trials.<sup>247</sup>

Even when the defense has a right to present certain matters to the sentencing authority the trial judge has discretion to decide in

<sup>245</sup>United States v. Teeter, 16 M.J. 68 (C.M.A. 1983); United States v. Koonce, 16 M.J. 660 (A.C.M.R. 1983); United States v. Brown, 13 M.J. 890 (A.C.M.R. 1982). Cf. United States v. Woods, NCMC 85 2939 (N.M.C.M.R. 31 Jan. 1986).

In *Teeter* the accused was convicted of premeditated murder. Sergeant Teeter did not testify during the merits but the defense counsel presented an alibi defense through the testimony of other witnesses. During extenuation and mitigation the accused wanted to resurrect the alibi defense through his own sworn testimony. The court held that it was proper for the trial judge to prevent Sergeant Teeter from re-litigating the findings of the court.

In *Brown* the defense counsel attempted to persuade the court members to reconsider their findings. The trial judge properly prohibited the defense counsel from using the sentence argument to challenge or re-litigate the court's findings.

Finally, *Woods* presents a novel twist to the issue. In *Woods* the trial judge allowed the accused to present his defense for the first time during extenuation and mitigation and allowed the defense counsel to urge reconsideration. When the defense tactic backfired the accused argued on appeal that the trial judge erred in permitting the defense evidence. The court held that the trial judge has the discretion to prohibit re-litigation of the findings but is not required to do so.

<sup>246</sup>United States v. Taylor, 21 M.J. 840 (A.C.M.R. 1986) (The defense is entitled to present competent evidence regarding the effect a particular sentence or punishment will have but may not have witnesses express an opinion on what type of sentence is appropriate. Recommendations about an appropriate punishment are not helpful to the fact finder, as required by Mil. R. Evid. 701, and pose the danger of unfair prejudice and confusion of issues); United States v. Carter, SPCM 17172 (A.C.M.R. 17 Nov. 1982); accord United States v. Randolph, 20 M.J. 850 (A.C.M.R. 1985) (improper for government aggravation witness to recommend a bad conduct discharge); United States v. Jenkins, 7 M.J. 504 (A.F.C.M.R. 1979) (improper for government witness to recommend the maximum punishment).

<sup>247</sup>The accused's sentence must be an individualized determination by the sentencing authority. See, e.g., United States v. Mamahy, 10 C.M.A. 102, 27 C.M.R. 176 (1959); United States v. McNeece, 30 C.M.R. 453 (A.B.R. 1960); see also United States v. Hutchinson, 15 M.J. 1056 (N.M.C.M.R. 1983) (Even in a capital case the accused cannot introduce evidence that a co-accused had a pretrial agreement guaranteeing a specific sentence limitation. Sentence disparity between a co-accused and the accused cannot be argued at trial even though under some circumstances sentence comparison is appropriate on review.).

For a discussion on how appellate courts determine sentence appropriateness when there are highly disparate sentences in closely related cases see United States v. Ballard, 20 M.J. 282 (C.M.A. 1985); United States v. Snelling, 14 M.J. 267 (C.M.A. 1982); United States v. Olinger, 12 M.J. 458 (C.M.A. 1982); United States v. Smith, 15 M.J. 948 (A.F.C.M.R. 1983); United States v. Theberge, 15 M.J. 667 (A.F.C.M.R. 1983); United States v. Harden, 14 M.J. 598 (A.F.C.M.R. 1982); United States v. Scantland, 14 M.J. 531 (A.C.M.R. 1982).

what form that testimony must be produced.<sup>248</sup> Under some circumstances the trial judge may properly compel the defense to use an adequate substitute for the live testimony of a material witness.<sup>249</sup>

### **C. CROSS-EXAMINATION OF DEFENSE WITNESSES**

Trial counsel should interview all defense witnesses (except the accused) prior to trial and should be prepared to conduct a cross-examination exposing any weaknesses in the foundation<sup>250</sup>

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<sup>248</sup>United States v. Combs, 20 M.J. 441 (C.M.A. 1985); United States v. Courts, 9 M.J. 285 (C.M.A. 1980); cf. United States v. Gonzalez, 16 M.J. 58 (C.M.A. 1983).

In *Combs* the accused asked the government to transport his mother from West Virginia to the general court-martial in Panama so she could testify on sentencing about her son's troubled family background and her plans to help him rehabilitate himself. The trial judge properly ruled that this testimony could adequately be presented in the form of a stipulation of fact as opposed to live testimony.

In *Courts* the trial judge properly ruled that the government was not required to bring the accused's sister from Indiana to trial in California even though she was a material sentencing witness. The trial judge determined within his sound discretion that some alternative to live testimony would adequately vindicate the accused's right to present this evidence to the sentencing authority.

In *Gonzalez* the court held that a government offer to stipulate to the expected testimony of material sentencing witnesses is not an adequate substitute for the live in-court testimony, although an offer to stipulate to the facts to which the witnesses were expected to testify may be. *Accord* United States v. Combs, 20 M.J. 441, 443 n. 3 ("The Government's offer to stipulate to expected testimony is not an adequate substitute for a stipulation of fact").

<sup>249</sup>United States v. Combs, 20 M.J. 441, 442 (C.M.A. 1985) (factors for the trial judge to consider are "whether the testimony relates to disputed matter; whether the Government is willing to stipulate to the testimony as fact; whether there is other live testimony available to appellant on the same subject; whether the testimony is cumulative of other evidence; whether there are practical difficulties in producing the witness; whether the credibility of the witness is significant; whether the request is timely; and whether another form of presenting the evidence (i.e., former testimony or deposition) is available and sufficient").

<sup>250</sup>See, e.g., United States v. Donnelly, 13 M.J. 79 (C.M.A. 1982) (The accused's immediate supervisor testified that he had known the accused since 1979 and in his opinion the accused was an outstanding airman, a good candidate for rehabilitation, and should be retained in the Air Force. On cross-examination the trial counsel asked the supervisor whether he was aware that the accused made a statement admitting that he had been selling hashish since April 1977. Trial counsel may not ask groundless questions about uncharged misconduct just to create unwarranted innuendo in the mind of the sentencing authority but where the trial counsel has a reasonable basis to believe the misconduct occurred it is permissible to ask about it to test the foundation of the character witness's opinion); United States v. Walker, SPCM 19907 (A.C.M.R. 30 Nov. 1984) (The accused's supervising NCO testified that the accused was a role model for others and so he gave the accused the highest ratings possible on his efficiency report. The trial counsel asked the supervisor whether he was aware that when he wrote the efficiency report the accused had already tested positive in a urinalysis. The trial counsel could properly test the weight to be given the character witness's testimony so long as there was a good faith factual basis for asking the question

or logic of defense witness's opinions about the accused's character. Cross-examination should also be used to lay the predicate for rebuttal testimony. Although it would be improper to interview the accused *ex parte*,<sup>251</sup> the trial counsel should anticipate possible areas of examination and should be prepared to conduct a cross-examination if the accused makes a sworn statement.<sup>252</sup>

The trial judge has considerable discretion in defining the appropriate scope of cross-examination.<sup>253</sup> The scope of cross-examination should be limited to the subject matter of direct examination and matters affecting the credibility of the witness.<sup>254</sup>

Specific incidents of uncharged misconduct can be inquired into if they impeach the credibility of the witness or are probative of untruthfulness.<sup>255</sup> When accused testify under oath they waive the privilege against self-incrimination with respect to the matters

and the incident asked about was relevant to the character traits addressed on direct examination).

<sup>251</sup>Model Code of Professional Responsibility DR 7-104(A)(1)(1980).

<sup>252</sup>R.C.M. 1001(c)(2)(B). The accused cannot be cross-examined about an unsworn statement.

<sup>253</sup>R.C.M. 611(b) ("The military judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct"). Samples of cross-examination that do not exceed the scope of direct are set forth in The Judge Advocate General's School, U.S. Army, Vol. I, Criminal Law Text, Evidence § 9-10 (May 1986). This section lists a number of cases where the trial counsel exceeded the scope of direct examination; the results might have been changed, however, by different cross-examination.

<sup>254</sup>R.C.M. 611(b); *United States v. Gambini*, 13 M.J. 423 (C.M.A. 1982); *see, e.g., United States v. Lang*, CM 443662 (A.C.M.R. 29 July 1983) (The accused made a sworn statement that his involvement with drugs destroyed his marriage, he had not used drugs since his apprehension, he liked his job, and he desired to stay in the Army. On cross-examination the trial counsel asked whether it was true that since prefferal of charges his duty performance had been bad and had included incidents of failure to repair as well as drunk on duty. Cross-examination exceeded the scope of direct); *United States v. Robideau*, 16 M.J. 819 (N.M.C.M.R. 1983) (The accused made a sworn statement that he did well during a prior enlistment in the Marine Corps. On cross-examination the trial counsel asked the accused what his intentions were regarding future service and why he committed the charged offenses. Cross-examination exceeded the scope of direct).

<sup>255</sup>Mil. R. Evid. 608(b); *see, e.g., United States v. Tubman*, SPCM 17962 (A.C.M.R. 13 Jan. 1984). In *Tubman*, the accused was convicted of drug offenses arising out of two separate transactions. During extenuation and mitigation the accused testified under oath that he distributed the drugs as a favor to a friend. On cross-examination the trial counsel asked the accused whether four years earlier he had sold drugs and made a false official statement about his drug involvement. The cross-examination was proper because the accused intimated through his testimony that he had never been involved with drugs before. The trial counsel was entitled to clarify that testimony. Once the accused unequivocally denied any prior drug involvement he could be impeached with specific incidents of prior drug related misconduct.

concerning which they testify<sup>256</sup> but do not necessarily waive the privilege against self-incrimination with respect to collateral or unrelated incidents of uncharged misconduct.<sup>257</sup> Because the trial counsel is unable to interview the accused the trial judge should be liberal in granting some latitude for "fishing" during cross-examination so long as the questions don't invoke the privilege against self-incrimination.

## VI. THE PROSECUTION CASE IN REBUTTAL

If the defense counsel puts on any evidence in extenuation and mitigation the trial counsel has the opportunity to present evidence in rebuttal.<sup>258</sup> This includes the opportunity to rebut any factual assertions the accused may have made in an unsworn

<sup>256</sup>Mil. R. Evid. 301(e).

<sup>257</sup>Mil. R. Evid. 608(b); *see, e.g.*, *United States v. Thomas*, 16 M.J. 899 (A.C.M.R. 1983). The accused made a sworn statement that she recognized the seriousness of her offenses, regretted committing the crimes, and desired to be all that she could be in the Army. On cross-examination the trial counsel asked who had initiated the charged sale of drugs and where the transaction took place. The scope of cross-examination exceeded the subject matter of direct examination and thus violated the accused's privilege against self-incrimination.

*Thomas* is a good illustration of how failure to prepare an effective cross-examination can undermine an otherwise good sentencing strategy. The trial counsel apparently wanted to highlight aggravating factors about the accused's sale of drugs. Aggravating factors properly include that the sale of drugs was to another soldier, that the sale occurred in the barracks, and that the sale was made willingly and without any persuasion.

The trial counsel had several options available to elicit this information. First, because *Thomas* pled guilty pursuant to a pretrial agreement, these matters could have been put into the stipulation of fact. *See supra* note 46 and accompanying text. Second these matters could have been presented through the testimony of witnesses as aggravation. *See supra* note 165 and accompanying text. Finally, the trial counsel could have elicited the information through a different cross-examination tactic. The trial counsel could have tested the sincerity of the accused's direct examination and used the questions to make the argument by asking questions such as:

"You indicated that you recognize the seriousness of your offense. Why is it serious?"

"What specific factors about your crime do you feel makes it serious?"

"Doesn't the fact that your sale took place on post (in the barracks) make your sale of drugs especially serious?"

"Why do you regret having sold drugs?"

"Do you regret having involved another soldier in drug use?"

"Is it regrettable that you sold drugs to another soldier who might use those drugs and harm himself or other people?"

"Do you regret having flagrantly undermined the discipline of your unit by making the barracks a drug hang-out?"

<sup>258</sup>R.C.M. 1001(d).



statement.<sup>259</sup> If the trial judge relaxed the rules of evidence for the defense during the case in extenuation and mitigation the trial judge may relax the rules of evidence to the same degree during rebuttal.<sup>260</sup> Rebuttal may properly include evidence to impeach the credibility of defense witnesses,<sup>261</sup> including the accused if a sworn statement was made during extenuation and mitigation.<sup>262</sup>

Pretrial preparation and "game planning" is essential to take full advantage of any "open doors" created during extenuation and mitigation. Trial counsel can help open doors by doing a good cross-examination of defense witnesses. If cross-examination questions are legitimately directed at exploring the direct examination the trial counsel can rebut matters elicited during the cross-examination.<sup>263</sup>

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<sup>259</sup>R.C.M. 1001(c)(2)(C). See, e.g., *United States v. Wallace*, ACM S26452 (A.F.C.M.R. 2 Nov. 1984) (after accused made an unsworn statement saying he had never used drugs at Edwards Air Force Base the government rebutted with an otherwise inadmissible letter of reprimand for use of marijuana while stationed there); *United States v. Wright*, ACM 23922 (A.F.C.M.R. 30 Aug. 1983) (The accused during an unsworn statement said "I would like to get my life straightened out as soon as I can get all this bad stuff behind me." Trial counsel could not rebut with evidence that the accused tried to sell drugs again before trial because it didn't rebut any factual assertion).

<sup>260</sup>R.C.M. 1001(d); accord Mil. R. Evid. 1101(c) ("The application of these rules may be relaxed in sentencing proceedings as provided under R.C.M. 1001").

<sup>261</sup>See, e.g., Mil. R. Evid. 608(a) (opinion and reputation evidence of character for untruthfulness); Mil. R. Evid. 608(c) (evidence of bias, prejudice, or any motive to misrepresent); Mil. R. Evid. 613 (extrinsic evidence of prior inconsistent statements).

<sup>262</sup>If the accused makes an unsworn statement he or she does not become a "witness" and the trial counsel cannot rebut the statement with evidence of untruthfulness (unless the defense has presented specific evidence of truthfulness). *United States v. Konarski*, 8 M.J. 146 (C.M.A. 1979); *United States v. Harris*, 13 M.J. 653 (N.M.C.M.R. 1982); *United States v. Shewmake*, 6 M.J. 710 (N.C.M.R. 1978); *United States v. McCurry*, 5 M.J. 502 (A.F.C.M.R. 1978).

<sup>263</sup>See, e.g., *United States v. Rodgers*, 18 M.J. 565 (A.C.M.R. 1984); *United States v. Jeffries*, 47 C.M.R. 699 (A.F.C.M.R. 1973).

In *Rodgers* the accused was convicted of possession and distribution of hashish on 21 June 1983. The defense presented three sergeants who testified that the accused could be rehabilitated for continued service in the Army. The trial counsel's cross-examination established that two of the sergeants based their opinion in part on the premise that the accused's offense was a one-time incident. On rebuttal the trial counsel was permitted to introduce the accused's pretrial admission that he had sold hashish on eight other occasions and had smoked hashish nine or ten times in the last year.

The *Jeffries* case provides a good example of how trial counsel can use cross-examination to expand rebuttal opportunities. In *Jeffries* the accused made a sworn statement that he was sorry for his offense, wished to complete his enlistment, and would do better if retained in the service. On cross-examination the trial counsel properly tested the sincerity of the testimony by asking the accused when he made the decision to do better. The accused replied "I've been trying ever since the offense." Trial counsel could then rebut this testimony with evidence that since the date of the offense the accused had been late to work and failed to comply with military appearance standards.

The appellate courts have been liberal in interpreting the permissible scope of rebuttal by holding that the trial counsel can rebut impressions and inferences created by the accused or defense witnesses.<sup>264</sup> There are three specific limitations on the liberal right to present rebuttal evidence: defense opinion evidence about general good duty performance and recommendations for retention in the service do not open the door to rebuttal with evidence of specific acts of misconduct;<sup>265</sup> defense evidence of remorsefulness cannot be rebutted by evidence of the accused's pretrial silence; and<sup>266</sup> defense witness's recommendations for leniency cannot be rebutted by recommendations as to any specific punishment.<sup>267</sup>

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<sup>264</sup>United States v. Strong, 17 M.J. 263 (C.M.A. 1984); United States v. Konarski, 8 M.J. 146 (C.M.A. 1979); United States v. Murphy, SPCM 19476 (A.C.M.R. 30 Mar. 1984); United States v. Mansel, 12 M.J. 641 (A.F.C.M.R. 1981); United States v. Oenning, 20 M.J. 935 (N.M.C.M.R. 1985).

In *Strong* the defense presented evidence that during a prior enlistment the accused received a good conduct medal and an honorable discharge. The trial counsel rebutted with otherwise inadmissible evidence of nonjudicial punishment administered during the prior enlistment. The defense had tried to create the impression that the accused's prior enlistment was unblemished. The trial counsel is entitled to rebut impressions and inferences created by the defense evidence.

In a rehearing on sentence held at the U.S. Disciplinary Barracks, Sergeant Konarski presented members of the prison cadre who testified that he should be retained in the service as an NCO and no further confinement was necessary. The trial counsel rebutted with expert psychiatric and psychological evidence that good behavior during confinement does not insure good behavior outside confinement; the accused could profit more from treatment in the disciplinary barracks than from outpatient treatment as a parolee; and the accused is likely to repeat his crimes if released from confinement. The court held that this was proper rebuttal because the defense witness's recommendation for retention in the service necessarily implied a belief that the accused would have continued good duty performance and would not commit future crimes.

In *Murphy* the defense presented documentary evidence that the accused received a good conduct medal for the period 15 January 1980 through 24 January 1983. The trial counsel was permitted to rebut with testimony of the accused's first line supervisor who testified that during that period the accused required constant supervision or else he would go to his room or another section and go to sleep.

In *Opening* the defense introduced an enlisted performance evaluation for the period 14 June to 27 October 1981 which said the accused willingly followed commands and regulations. The trial counsel rebutted this evidence by presenting an otherwise inadmissible record of nonjudicial punishment for possession of marijuana on 18 July 1981. The court held that this was proper rebuttal because the defense had created the reasonable inference that the accused's record for that period of time covered by the performance evaluation was unblemished.

<sup>265</sup>United States v. Gambini, 13 M.J. 423 (C.M.A. 1982) (relying in part on para. 138(f), MCM, 1969).

<sup>266</sup>United States v. Friedman, 14 M.J. 865 (C.G.C.M.R. 1982); United States v. Morris, 9 M.J. 551 (N.M.C.M.R. 1980).

<sup>267</sup>United States v. Jenkins, 7 M.J. 504 (A.F.C.M.R. 1979) (improper for government witness to recommend "the maximum punishment").

## VII. OTHER FACTORS WHICH MAY BE CONSIDERED ON SENTENCING

### A. PLEA OF GUILTY

Upon a timely defense request, the accused is entitled to an instruction that a plea of guilty usually saves the Government time, effort, and expense.<sup>268</sup>

### B. TIME SPENT IN PRETRIAL CONFINEMENT

The military judge must instruct, upon defense request, that time spent in pretrial confinement should be considered in deciding an appropriate sentence.<sup>269</sup> Since the accused receives administrative day-for-day credit for time spent in pretrial confinement<sup>270</sup> a complete instruction should also inform the court members about the administrative credit.<sup>271</sup>

### C. THE ACCUSED'S FALSE TESTIMONY ON THE MERITS

If the findings indicate that the court must have disbelieved the sworn testimony of the accused on the merits, it may consider the accused's mendacity during sentencing if certain prerequisites are

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<sup>268</sup>United States v. Simpson, 16 M.J. 506 (A.F.C.M.R. 1983); United States v. McLeskey, 15 M.J. 565 (A.F.C.M.R. 1982); accord United States v. Fisher, 21 M.J. 327 (C.M.A. 1986) (an instruction about the mitigating effect of a guilty plea is appropriate but absent a defense objection or request for instruction failure to give the instruction is not reversible error).

<sup>269</sup>United States v. Davidson, 14 M.J. 81 (C.M.A. 1982). Note that an accused can still receive the maximum punishment authorized despite having been in pretrial confinement. United States v. Groshong, 14 M.J. 186 (C.M.A. 1982).

<sup>270</sup>United States v. Allen, 17 M.J. 126 (C.M.A. 1984); accord R.C.M. 305(k).

<sup>271</sup>United States v. Stark, 19 M.J. 519 (A.C.M.R. 1984). The court suggests the following instruction:

In determining an appropriate sentence in this case you should consider that the accused has spent \_\_\_\_ days in pretrial confinement. In this connection, you should consider the fact that if you adjudge confinement... as part of your sentence, the \_\_\_\_ days (he)(she) spent in pretrial confinement will be credited against any sentence to confinement you adjudge. This credit will be given by authorities at the correctional facility where the accused is sent to serve confinement and will be given on a day-for-day basis.

Stark, 19 M.J. 527 n.3; see also United States v. Noonan, 21 M.J. 763 (A.F.C.M.R. 1986) (the court members should also be instructed how many days credit will be given if the accused receives credit for illegal pretrial confinement pursuant to R.C.M. 305(k)).

met.<sup>272</sup> First, the court<sup>273</sup> must conclude that the accused lied.<sup>274</sup> Second, the court must conclude that the false testimony was willful and concerned a material matter.<sup>275</sup> Finally, the court may not punish the accused for lying but may properly consider the accused's false testimony only as a factor relating to the accused's rehabilitative potential.<sup>276</sup> The military judge must give a limiting instruction outlining these prerequisites if the trial counsel argues the accused's mendacity.<sup>277</sup> The military judge may give the limiting instruction *sua sponte* even if the trial counsel does not argue the matter.<sup>278</sup>

### **D. THE ACCUSED'S ABSENCE FROM TRIAL**

If the accused is tried *in absentia* the sentencing authority may not punish the accused for the unauthorized absence but may consider the accused's voluntary absence as an indication of the accused's rehabilitation potential.<sup>279</sup>

### **E. ADMINISTRATIVE CONSEQUENCES OF A SENTENCE**

As a general rule, the court members cannot be instructed on, and cannot consider, the administrative consequences of their

<sup>272</sup>United States v. Warren, 13 M.J. 278 (C.M.A. 1982).

<sup>273</sup>These prerequisites also apply to the military judge when acting as sentencing authority. United States v. Beaty, 14 M.J. 155 (C.M.A. 1982).

<sup>274</sup>United States v. Warren, 13 M.J. 278 (C.M.A. 1982).

<sup>275</sup>*Id.* The appellate court may be willing to forgive the trial judge for omitting this portion of the instruction if it is clear from the facts that if the court members believed the accused lied it must have involved material matters. United States v. Carey, CM 441279 (20 May 1983).

<sup>276</sup>United States v. Warren, 13 M.J. 278 (C.M.A. 1982). The trial judge must make it clear that the court members cannot punish the accused for committing perjury. United States v. Watkins, 17 M.J. 783 (A.F.C.M.R. 1983).

Failure to limit consideration to impact on rehabilitation is not cured by the general instruction that the accused should be "sentenced only for the offense for which he has been found guilty." United States v. Miree, SPCM 18301 (A.C.M.R. 7 Nov. 1983); United States v. Carey, CM 441279 (A.C.M.R. 20 May 1983); *accord* United States v. Pointer, CM 442435 (A.C.M.R. 30 Dec. 1983) (improper for trial counsel to argue "rehabilitation is not even an issue" for a drug peddler who lies to the military judge).

<sup>277</sup>United States v. Gore, 14 M.J. 945 (A.C.M.R. 1982); United States v. Rench, 14 M.J. 764 (A.C.M.R. 1982); United States v. Baxter, 14 M.J. 762 (A.C.M.R. 1982).

<sup>278</sup>United States v. Cabebe, 13 M.J. 303 (C.M.A. 1982). The Warren instruction can be given over defense objection. United States v. Fisher, 17 M.J. 768 (A.F.C.M.R. 1983).

<sup>279</sup>United States v. Chapman, 20 M.J. 717 (N.M.C.M.R. 1985), *petition for review granted*, 21 M.J. 306 (C.M.A. 1986).

sentence.<sup>280</sup> Their duty is to adjudge a sentence based on the evidence presented in court without regard to outside considerations such as the possibility of clemency action<sup>281</sup> or the possibility of parole.<sup>282</sup> Command policies and directives regarding the disposition of offenders or directives impacting on the military corrections system are not appropriate sentencing factors and the military judge has a *sua sponte* duty to exclude them from consideration.<sup>283</sup> The court members may, however, consider that a punitive discharge is a serious punishment<sup>284</sup> which deprives an individual of substantially all benefits administered by the Veterans Administration.<sup>285</sup>

Although the guidelines in the area are unclear, there is some authority which suggests that a military judge may consider administrative consequences of a sentence, such as rules govern-

<sup>280</sup>United States v. Ellis, 15 C.M.A. 8, 34 C.M.R. 454 (1964); United States v. Wheeler, 18 M.J. 823 (A.C.M.R. 1984).

<sup>281</sup>Benchbook, para. 2-37.

<sup>282</sup>See, e.g., United States v. Bates, CM 443075 (A.C.M.R. 11 Apr. 1984); United States v. Howell, 16 M.J. 1003, 1007 (A.C.M.R. 1983) (Naughton, J., concurring) (improper for trial counsel to tell court members to consider fact the accused will receive "good time").

<sup>283</sup>United States v. Grady, 15 M.J. 275 (C.M.A. 1983) (The mention of command policies about disposition of offenders invades the province of the court members to determine an appropriate sentence and risks improperly injecting the "commander" into the court-martial sentencing. This prohibition applies to both the trial counsel and the defense counsel); see also United States v. Reitz, 17 M.J. 51 (C.M.A. 1983) (improper reference to Chief of Naval Operations anti-drug policy); United States v. Schomaker, 17 M.J. 858 (N.M.C.M.R. 1984) (improper reference to the Marine Corp's strong policy against drugs); United States v. Visalli, NCMC 84 1589 (N.M.C.M.R. 23 Aug. 1984) (improper reference to Chief of Naval Operations anti-drug buzz words "Not on my watch, not in my ship, and not in my Navy"); United States v. Harris, ACM S26157 (A.F.C.M.R. 25 Jan. 1984) (improper reference to Air Force drug policy); United States v. Kiddo, 16 M.J. 775 (A.C.M.R. 1983) (improper for trial counsel to purport to speak for the convening authority).

But cf. United States v. Colon-Rodriguez, CM 443211 (A.C.M.R. 30 June 1983) (Trial counsel argued "Your Army needs for this individual not to remain in the service any longer." This argument was proper because it merely informed the members that they should consider the needs of the service. It did not inject command policy or the opinions of higher authorities); United States v. Robertson, 17 M.J. 846 (N.M.C.M.R. 1984) (on the facts of the case it was not prejudicial error for trial counsel to refer to the Commandants's drug policy); United States v. Barus, 16 M.J. 624 (A.F.C.M.R. 1983) (trial counsel argument that "we try to let everybody know what our policy is in the Air Force" was not improper because it didn't refer to any specific policy and therefore did not suggest any particular sentence).

<sup>284</sup>See United States v. Soriano, 20 M.J. 337 (C.M.A. 1985) (it was error for the trial judge to instruct that "A punitive discharge may affect an accused's future with regard to his legal rights, economic opportunities and social acceptability" instead of "will clearly affect. . .").

<sup>285</sup>United States v. Chasteen, 17 M.J. 580 (A.F.C.M.R. 1983); United States v. Simpson, 16 M.J. 506 (A.F.C.M.R. 1983).

ing parole eligibility, when sitting as the sentencing authority.<sup>286</sup>

## F. PURPOSES OF SENTENCING

If requested by either side, the military judge may in his or her discretion instruct that the five principal reasons for adjudging a sentence are: protection of society from the wrongdoer; punishment of the wrongdoer; rehabilitation of the wrongdoer; preservation of good order and discipline in the military; and the deterrence of the wrongdoer and those who know of his/her crime and sentence from committing the same or similar offenses.<sup>287</sup>

General deterrence may be considered (and argued) as an appropriate factor so long as it is not considered to the exclusion of other appropriate factors.<sup>288</sup> Specific deterrence is also a proper sentencing consideration.<sup>289</sup>

The military judge *must* tailor his or her sentencing instructions to the evidence presented in the case,<sup>290</sup> and must stress the need for an individualized sentence.<sup>291</sup>

## G. SENTENCE WORKSHEET

In a court-martial with sentencing by members the trial counsel will ordinarily prepare a sentence worksheet tailored to reflect all

<sup>286</sup>See *United States v. Hannan*, 17 M.J. 115 (C.M.A. 1984).

Thus, in seeking to arrive at an appropriate sentence, Judge W. properly took into account the rules governing parole eligibility. Indeed, military judges can best perform their sentencing duties if they are aware of the directives and policies concerning good-conduct time, parole, eligibility for parole, retraining programs, and the like.

*Hannan*, 17 M.J. at 123.

<sup>287</sup>Benchbook, para. 2-59.

<sup>288</sup>*United States v. Lania*, 9 M.J. 100 (C.M.A. 1980).

<sup>289</sup>*United States v. Hubbard*, CM 446993 (A.C.M.R. 26 Dec. 1985) (an expert was permitted to testify that child sex abusers have about 70% recidivism when they don't receive treatment, treatment should usually consist of two or three years of isolation therapy, and the disciplinary barracks has one of the best sex offender treatment programs in the world); *United States v. Garcia*, 18 M.J. 716 (A.F.C.M.R. 1984) (the trial counsel was permitted to introduce evidence that men who commit sexual offenses with children have over 80% recidivism when not incarcerated).

<sup>290</sup>*United States v. Wheeler*, 17 C.M.A. 274, 38 C.M.R. 72 (1967); see also R.C.M. 1005(a) discussion; *United States v. Slaton*, 6 M.J. 254 (C.M.A. 1979) (error not to instruct that mental impairment was a mitigating factor); *United States v. Below*, ACM S26133 (A.F.C.M.R. 28 Oct. 1983) (error not to comment on the accused's combat record).

<sup>291</sup>R.C.M. 1005(e)(4). See, e.g., *United States v. Smart*, SPCM 20153 (A.C.M.R. 28 Feb. 1984) (plain error for trial counsel to urge court members to wreak vengeance on the accused to make up for the fact that two of the panel members had been victims of unsolved larcenies in the past).



sentencing alternatives.<sup>292</sup> The military judge and the defense counsel examine the worksheet at an Article 39(a) session.<sup>293</sup> During deliberations, the court members use the sentence worksheet as a guide to assist them in putting their sentence in proper form.<sup>294</sup> The worksheet is marked as an appellate exhibit and attached to the record of trial.<sup>295</sup>

## VIII. SENTENCING PROCEDURES

### A. VOTING PROCEDURE

After all the evidence has been presented, counsel have made their closing arguments, and the military judge has instructed on the law, the court members retire to deliberate on the sentence.<sup>296</sup> Deliberations must take place with all members present and without any outside intrusions.<sup>297</sup>

Before voting, the members should enter into full and free discussion of all available evidence.<sup>298</sup> The members may ask for additional evidence if it appears that they have insufficient evidence for a proper determination or if it appears they have not received all available admissible evidence.<sup>299</sup>

When the court members have completed their discussions each member may propose a complete sentence in writing.<sup>300</sup> The junior court member collects the proposals<sup>301</sup> and delivers them to the president of the court who arranges them in order of severity.<sup>302</sup>

<sup>292</sup>R.C.M. 1005(e)(1) discussion. For an example see MCM, 1984, app. 11. *But cf.* United States v. Brandolini, 13 M.J. 163 (C.M.A. 1982) (not error to omit "no punishment" from the worksheet where it was not a plausible alternative).

<sup>293</sup>R.C.M. 1006(e) discussion.

<sup>294</sup>*Id.*

<sup>295</sup>Benchbook, para. 2-38; *see also* United States v. King, 13 M.J. 838, 842 (A.C.M.R. 1982) (error for trial judge not to allow defense counsel to examine the worksheet and not to append the worksheet to the trial record).

<sup>296</sup>R.C.M. 1006(a).

<sup>297</sup>*Id.*

<sup>298</sup>R.C.M. 1006(b).

<sup>299</sup>*Id.* The military judge decides whether the additional evidence will be produced as an interlocutory, discretionary ruling. Factors the trial judge will consider include the difficulty in obtaining the witness, the materiality of the evidence, the likelihood that the evidence is subject to a claim of privilege, and the objections of the parties. United States v. Lampani, 14 M.J. 22, 26 (C.M.A. 1982).

<sup>300</sup>R.C.M. 1006(c).

<sup>301</sup>*Id.*

<sup>302</sup>*Id.* The president's determination of the relative severity of the proposed sentences is subject to the objection of a majority of the other members. The trial judge may assist by providing factual statements about relative severity of different punishments but may not make conclusory comments such as "a BCD is more severe than confinement." United States v. Holland, 19 M.J. 883 (A.C.M.R. 1985); United States v. Cavalier, 17 M.J. 573 (A.F.C.M.R. 1983).

The court members then vote on the proposals by secret, written ballot<sup>303</sup> beginning with a vote on at least severe proposal.<sup>304</sup> The members continue to vote on the proposals in the increasing order of their severity until the required number of concurring votes are obtained to select a sentence.<sup>305</sup>

For sentences including the death penalty, the vote must be unanimous.<sup>306</sup> For noncapital sentences, a two-thirds concurrence is required for sentences including confinement for ten years or less,<sup>307</sup> and a three-fourths concurrence is required for sentences including more than ten years confinement.<sup>308</sup>

If none of the proposed sentences receive the required amount of concurrence, the members repeat the entire process of discussion, proposal, and balloting.<sup>309</sup> The court members have no duty to agree on a sentence; therefore, it is possible to have a "hung jury" on sentence.<sup>310</sup> The military judge may not coerce the members into reaching a compromise sentence.<sup>311</sup> If the members cannot agree on a sentence, the military judge should declare a mistrial and return the case to the convening authority who may direct a rehearing on sentence or order a sentence of "no punishment."<sup>312</sup>

The court must announce its sentence as soon as it is determined.<sup>313</sup> "Announcement" occurs when the president of the court reads, in open court, the sentence which was actually reached by the court during its deliberations.<sup>314</sup>

<sup>303</sup>UCMJ art. 51; R.C.M. 1006(d)(2).

<sup>304</sup>R.C.M. 1006(d)(3)(A); *United States v. Lumm*, 1 M.J. 35 (C.M.A. 1975). Failure to instruct the members to begin voting with the lightest proposal may constitute plain error even absent defense objection. *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986); *United States v. Scott*, 22 M.J. 646 (A.C.M.R. 1986).

<sup>305</sup>R.C.M. 1006(d)(3)(A). Once the required number of votes is obtained on a proposed sentence that sentence becomes the sentence of the court. Voting should be on the proposed sentence in its entirety. *United States v. Dees*, NMCM 84 2131 (N.M.C.M.R. 19 Oct. 1984).

<sup>306</sup>UCMJ art. 52(b)(1); R.C.M. 1006(d)(4)(A).

<sup>307</sup>UCMJ art. 52(b)(2); R.C.M. 1006(d)(4)(B).

<sup>308</sup>UCMJ art. 52(b)(3); R.C.M. 1006(d)(4)(C).

<sup>309</sup>R.C.M. 1006(d)(3)(A).

<sup>310</sup>R.C.M. 1006(d)(6).

<sup>311</sup>*United States v. Straukas*, 41 C.M.R. 975 (A.F.C.M.R. 1970) ("hung jury" instruction that members were under an obligation to reach a sentence created a fair risk of a compromise verdict requiring a rehearing on sentence).

<sup>312</sup>R.C.M. 1006(d)(6).

<sup>313</sup>UCMJ art. 53; R.C.M. 1007(a); *United States v. Lee*, 13 M.J. 181 (C.M.A. 1982) (it was error for the military judge to seal the court's sentence pending resolution of a defense petition to dismiss charges based on a violation of the USAREUR 45 day rule).

<sup>314</sup>R.C.M. 1007(b).

Prior to announcement of the sentence, the military judge should review the sentence worksheet to ensure that the sentence is in a proper form.<sup>315</sup> Examination of the sentence worksheet<sup>316</sup> or oral clarification of the worksheet<sup>317</sup> does not constitute "announcement" of the sentence.

If the president of the court incorrectly states the sentence which was agreed upon during deliberations this "slip of the tongue" does not constitute an announcement of the sentence.<sup>318</sup> A "slip of the tongue" concerning the court's sentence can be corrected anytime before the authenticated record of trial is forwarded to the convening authority<sup>319</sup> without resort to formal reconsideration procedures.<sup>320</sup>

In announcing the sentence, the president should not disclose the specific number of votes for or against the sentence.<sup>321</sup> If the court's oral announcement of a sentence is legal and unambiguous a conflicting worksheet does not affect the validity of the sentence.<sup>322</sup>

## **B. RECONSIDERATION OF SENTENCE**

After a sentence proposal receives the required number of concurring votes during the balloting, that sentence becomes the final verdict<sup>323</sup> and there can be no further balloting unless done pursuant to proper reconsideration procedures.<sup>324</sup>

The court<sup>325</sup> may reconsider a sentence with a view towards decreasing it anytime before the record of trial is authenticated.<sup>326</sup> A sentence can be reconsidered with a view toward increasing it only before that sentence is announced in open court.<sup>327</sup>

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<sup>315</sup>R.C.M. 1006(e) discussion.

<sup>316</sup>R.C.M. 1006(e).

<sup>317</sup>*Id.*

<sup>318</sup>R.C.M. 1007(b).

<sup>319</sup>*Id.*

<sup>320</sup>R.C.M. 1009.

<sup>321</sup>R.C.M. 1006(e) discussion. Under the 1984 Manual the court is no longer required to announce that the required "two-thirds" or "three-fourths" concurrence was obtained. There is a presumption that the court members properly complied with the military judge's voting instructions. R.C.M. 1006(e) analysis.

<sup>322</sup>*United States v. Donnelly*, 12 M.J. 503 (A.F.C.M.R. 1981).

<sup>323</sup>R.C.M. 1009(d) discussion.

<sup>324</sup>R.C.M. 1009.

<sup>325</sup>The military judge presiding over a trial by military judge alone may reconsider a sentence in accordance with the same timing limitations applicable to reconsideration by the court members.

<sup>326</sup>R.C.M. 1009(a).

<sup>327</sup>R.C.M. 1009(b).

As a general rule the military judge does not instruct on reconsideration procedures unless one of the court members requests the instruction or proposes reconsideration.<sup>328</sup> Once a timely proposal for reconsideration is made by one of the court members the entire panel must vote on whether they wish to rebalot.<sup>329</sup> Voting must be by secret written ballot.<sup>330</sup> A sentence may be reconsidered with a view toward increasing the sentence only if a majority of the members vote for reconsideration.<sup>331</sup> A sentence which includes confinement for more than ten years may be reconsidered with a view toward decreasing the sentence if more than one-fourth of the members vote for reconsideration.<sup>332</sup> A sentence which includes ten years of confinement or less may be reconsidered with a view toward decreasing the sentence if more than one-third of the members vote for reconsideration.<sup>333</sup> The following chart shows the number of votes required for sentence reconsideration by various size panels:

Number of court members	To increase a sentence	To decrease a sentence of 10 years or less	To decrease a sentence over 10 years
3	2	2	1
4	3	2	2
5	3	2	2
6	4	3	2
7	4	3	2
8	5	3	3
9	5	4	3
10	6	4	3
11	6	4	3
12	7	5	4
13	7	5	4
14	8	5	4

### C. DEFECTIVE SENTENCES

Normally, ambiguities or illegalities in the sentence should be detected by the military judge when the sentence worksheet is

<sup>328</sup>Benchbook, para. 2-30; *United States v. Bridges*, NCMC 84 1964 (N.M.C.M.R. 7 Feb. 1984) (although the trial judge can clarify ambiguities in a sentence reached by the court members, it is improper for the trial judge to suggest to the court members that they should reconsider their verdict).

<sup>329</sup>R.C.M. 1009(d)(2).

<sup>330</sup>*Id.*

<sup>331</sup>R.C.M. 1009(d)(3)(A).

<sup>332</sup>R.C.M. 1009(d)(3)(B)(ii).

<sup>333</sup>R.C.M. 1009(d)(3)(B)(iii).

examined prior to announcement of the verdict.<sup>334</sup> After the sentence is announced, the military judge can seek a clarification of the ambiguity or illegality any time prior to adjournment.<sup>335</sup> After the case is adjourned, the military judge may initiate a reconsideration proceeding but only with a view to clarifying or decreasing the sentence;<sup>336</sup> the convening authority can order a proceeding to seek clarification;<sup>337</sup> or the convening authority can approve the lowest legal, unambiguous sentence adjudged.<sup>338</sup>

The court may not suspend a sentence;<sup>339</sup> that authority is reserved to the convening authority.<sup>340</sup> A recommendation by the court to suspend a sentence does not, standing alone, impeach the sentence.<sup>341</sup>

Once a sentence is reached, there are strong policy reasons for preventing collateral attacks on the procedures used by the court to arrive at their sentence.

The sanctity of the deliberative process is protected by a deliberative privilege designed to provide finality to proceedings and to promote full and free discussions during deliberations.<sup>342</sup> The general rule is that the court will not consider testimony or affidavits from court members<sup>343</sup> or third parties<sup>344</sup> offered to attack the internal procedures of the jury unless the party attacking the verdict alleges that the verdict was tainted by outside influence; extraneous prejudicial information; or unlawful command influence.<sup>345</sup>

<sup>334</sup>R.C.M. 1006(e) discussion.

<sup>335</sup>R.C.M. 1009(c)(2)(B).

<sup>336</sup>R.C.M. 1009(c)(2)(B); R.C.M. 1009(b).

<sup>337</sup>R.C.M. 1009(c)(3).

<sup>338</sup>*Id.*

<sup>339</sup>United States v. Occhi, 2 M.J. 60 (C.M.A. 1976).

<sup>340</sup>UCMJ art. 71(d).

<sup>341</sup>*See, e.g.,* United States v. Cimoli, 10 M.J. 516 (A.F.C.M.R. 1980); United States v. McLaurin, 9 M.J. 855 (A.F.C.M.R. 1980).

<sup>342</sup>R.C.M. 923; Mil. R. Evid. 509; Mil. R. Evid. 606. *See also* Dean, *The Deliberative Privilege Under M.R.E. 509*, *The Army Lawyer*, Nov. 1981, at 1; Criminal Law Division, TJAGSA, *New Developments in Impeachment of Verdicts*, *The Army Lawyer*, Oct. 1985, at 38.

<sup>343</sup>Mil. R. Evid. 606.

<sup>344</sup>Although Mil. R. Evid. 606 expressly applies only to the testimony/affidavits of members, case law extends the privilege to third persons who "intrude" upon the deliberative process. *See, e.g.,* United States v. Perez-Pagan, 47 C.M.R. 719 (A.C.M.R. 1973) (the court reporter); United States v. Harris, 32 C.M.R. 878 (A.F.B.R. 1962) (affidavit by the accused who overheard the jury's deliberations).

<sup>345</sup>Mil. R. Evid. 606. Procedural irregularities, failure to follow the military judge's instructions, or "second thoughts" by the court members are not grounds for impeachment of the verdict. *See generally* United States v. Hance, 10 M.J. 622 (A.C.M.R. 1980); United States v. Higdon, 2 M.J. 445 (A.C.M.R. 1975).

Although the rules against impeaching verdicts expressly cover verdicts reached by court members, the same limitations apply when one of the parties to the trial seeks to impeach the verdict in a trial by military judge alone.<sup>346</sup>

### 1. *Outside influence.*

Outside influence probably is limited to direct influences on court members such as threats to members of the panel, bribery of court members, or threats to the member's family.<sup>347</sup>

### 2. *Extraneous prejudicial information.*

"Extraneous prejudicial information" includes consideration of any matters not properly presented for consideration during the trial such as improper referral to the Manual or other legal authority;<sup>348</sup> unauthorized visit to the crime scene;<sup>349</sup> private conversations between a witness and a court member;<sup>350</sup> and prejudicial remarks by the bailiff to a court member.<sup>351</sup>

### 3. *Unlawful command influence.*

Unlawful command influence includes both the illegal use of superiority of rank by a senior court member to influence a junior court member,<sup>352</sup> and improper direct and indirect influences brought to bear on a court member by other senior officers such as the convening authority or the court member's commanding officer.<sup>353</sup>

<sup>346</sup>United States v. Rice, 20 M.J. 764 (A.F.C.M.R. 1985) (allegations that the trial judge may have misunderstood the evidence presented at trial could not constitute a basis for impeaching the military judge's verdict because the allegation did not fall within one of the three exceptions in Mil. R. Evid. 606).

<sup>347</sup>See generally, J. Weinstein & M. Berger, Weinstein's Evidence 606 (1978).

<sup>348</sup>United States v. Dobbs, 11 C.M.A. 328, 29 C.M.R. 144 (1960); United States v. Rinehart, 8 C.M.A. 402, 24 C.M.R. 212 (1957).

<sup>349</sup>United States v. Witherspoon, 16 M.J. 252 (C.M.A. 1983); United States v. Davis, 19 M.J. 689 (A.C.M.R. 1984).

<sup>350</sup>United States v. Almeida, 19 M.J. 874 (A.F.C.M.R. 1985).

<sup>351</sup>See Parker v. Gladden, 385 U.S. 363 (1966).

<sup>352</sup>Prior to the Military Rules of Evidence appellate courts disagreed as to whether in-court command influence was an exception to the deliberative privilege. Compare United States v. Lil, 15 C.M.R. 472 (A.B.R. 1954) with United States v. Connors, 23 C.M.R. 636 (A.B.R. 1957).

After the Military Rules of Evidence there was still some disagreement. Although the drafters of the Military Rules of Evidence clearly intended in-court command influence to be a ground for impeaching the verdict, Mil. R. Evid. 606 (1980 analysis), the first post-MRE appellate decision disagreed with the drafters. See United States v. Accordini, 15 M.J. 825 (A.F.C.M.R. 1983).

The Court of Military Appeals resolved this issue in United States v. Carr, 18 M.J. 297 (C.M.A. 1984) and United States v. Accordini, 20 M.J. 102 (C.M.A. 1985) holding that use of superiority of rank was improper and was a ground for impeaching a verdict pursuant to Mil. R. Evid. 606.

<sup>353</sup>Mil. R. Evid. 606.



### D. PROCEDURE

Allegations that a verdict was illegally arrived at should be resolved by the military judge.<sup>354</sup> The military judge should first determine whether the allegations fit within one of the three exceptions to the deliberative privilege.<sup>355</sup> If so, the judge may receive testimony and affidavits of court members in support of the allegations.<sup>356</sup> The court may inquire into objective facts supporting or refuting the allegations but the court members cannot be asked to disclose their vote,<sup>357</sup> their mental process used to arrive at their verdict,<sup>358</sup> or their subjective evaluation of whether the alleged impermissible influence affected their vote.<sup>359</sup> The polling of court members is expressly prohibited.<sup>360</sup>

## IX. PUNISHMENTS AUTHORIZED AT COURTS-MARTIAL

A court-martial can adjudge only those punishments specifically listed in the Manual for Courts-Martial.<sup>361</sup> Although the Manual is fairly straightforward about what punishments are available trial counsel should be alert to some of the nuances which are outlined below.

### A. DEATH PENALTY

The last soldier executed under the UCMJ was PFC John Bennett, hanged in 1961 for rape and attempted murder.<sup>362</sup> In the early 1970s, the Supreme Court of the United States decided that virtually all state laws that allowed the death penalty were unconstitutional.<sup>363</sup>

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<sup>354</sup>R.C.M. 923 discussion; *United States v. Martinez*, 17 M.J. 916 (N.M.C.M.R. 1984); see also *United States v. Davis*, 19 M.J. 689 (A.C.M.R. 1984) (when post-trial allegations were made that some court members had impermissibly visited the crime scene during a recess in the trial, the military judge should have conducted a limited hearing to determine whether the accused had been prejudiced by the viewing).

<sup>355</sup>Mil. R. Evid. 606.

<sup>356</sup>*Id.*

<sup>357</sup>R.C.M. 922(e).

<sup>358</sup>Mil. R. Evid. 606.

<sup>359</sup>*United States v. Martinez*, 17 M.J. 916 (N.M.C.M.R. 1984).

<sup>360</sup>R.C.M. 922(e).

<sup>361</sup>R.C.M. 1003(b). The 1984 Manual makes it clear that court-martial is limited to the types of punishment specifically listed. The 1969 Manual was not as clear although case law filled the void by excluding certain types of punishment.

<sup>362</sup>English, *The Constitutionality of the Court-Martial Death Sentence*, 21 A.F.L. Rev. 552 (1979).

<sup>363</sup>See, e.g., *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).

Although the Supreme Court never directly decided the constitutionality of the military death penalty,<sup>364</sup> their decisions addressing the constitutional prerequisites to the imposition of capital punishment in a number of state cases cast doubt as to the constitutionality of the military death penalty.<sup>365</sup>

In 1982-1983, the Courts of Military Review split<sup>366</sup> on the constitutionality of the capital punishment procedures contained in the 1969 Manual.<sup>367</sup> Finally, the Court of Military Appeals decided the issue in the case of *United States v. Matthews*,<sup>368</sup> holding the military death penalty provisions unconstitutional.<sup>369</sup> The President responded by enacting new capital punishment procedures effective 25 January 1984.<sup>370</sup> These new provisions were then incorporated into the 1984 Manual.<sup>371</sup> No capital punishment cases adjudged under the 1984 Manual provisions have yet been reviewed by the appellate courts.<sup>372</sup>

The capital punishment procedures contained in R.C.M. 1004 are designed to ensure that a death penalty is adjudged only after an individualized evaluation of the accused's case, and only after specific aggravating factors are found to have been present.

The Manual now contains an exclusive list of aggravating circumstances which may be relied upon to impose a death penalty<sup>373</sup> for an offense referred to the court as capital.<sup>374</sup> Before

<sup>364</sup>The Supreme Court declined the opportunity to decide the issue. *Schick v. Reed*, 419 U.S. 256 (1974).

<sup>365</sup>See generally Pavlick, *The Constitutionality of the U.C.M.J. Death Penalty Provisions*, 97 Mil. L. Rev. 81 (1982); Pfau & Milhizer, *The Military Death Penalty and the Constitution: There Is Life After Furman*, 97 Mil. L. Rev. 35 (1982).

<sup>366</sup>The military death penalty provisions were upheld in *United States v. Matthews*, 13 M.J. 501 (A.C.M.R. 1982); *United States v. Rojas*, 15 M.J. 902 (N.M.C.M.R. 1983); and *United States v. Hutchinson*, 15 M.J. 1056 (N.M.C.M.R. 1983). The military death penalty was held to be unconstitutional in *United States v. Gay*, 16 M.J. 586 (A.F.C.M.R. 1983).

<sup>367</sup>MCM, 1969, para. 75.

<sup>368</sup>*United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983) (mandate issued 27 Oct. 1983).

<sup>369</sup>*Id.*

<sup>370</sup>Exec. Order No. 12,460, 49 Fed. Reg. 3169 (1984).

<sup>371</sup>R.C.M. 1004.

<sup>372</sup>The first military case to have a death penalty adjudged under R.C.M. 1004 was the case of *United States v. Dock*, tried on 16 November 1984 at the 3d Armored Division, Frankfurt, West Germany.

<sup>373</sup>R.C.M. 1004. Some of the aggravating circumstances which may be relied on to adjudge a death penalty for premeditated murder are:

- a. The accused has been found guilty in the same case of another murder.
- b. The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim.
- c. The accused knew the victim was a commissioned, warrant, noncommissioned, or petty officer in the execution of office.

arraignment, the trial counsel must give the defense written notice of those aggravating circumstances the prosecution intends to prove.<sup>376</sup> After all the evidence supporting the case has been introduced the military judge must instruct the court members on such aggravating circumstances as may be in issue, and must instruct the members to consider all of the defense evidence in extenuation and mitigation.<sup>376</sup>

Before a death penalty may be adjudged, the court members must unanimously find beyond a reasonable doubt that one or more of the aggravating circumstances existed<sup>377</sup> and they must also unanimously find that any mitigating circumstances are substantially outweighed by the aggravating circumstances.<sup>378</sup> When the members announce their sentences they also announce which aggravating circumstances were found by unanimous vote.<sup>379</sup>

## B. SEPARATION FROM THE SERVICE

There are only three types of punitive separation authorized as a punishment at courts-martial: <sup>380</sup> dismissal, <sup>381</sup> dishonorable discharge, <sup>382</sup> and bad-conduct discharge.<sup>383</sup>

A dismissal is the only type of punitive separation which can be imposed on a commissioned officer, a commissioned warrant officer, or a cadet.<sup>384</sup> Only a general court-martial can adjudge a

d. The accused knew the victim was a member of a law enforcement or security agency or activity and was in the execution of office.

e. The accused was engaged in the commission, attempted commission, or flight after commission of any robbery, rape, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy.

f. The accused procured another by means of compulsion, coercion, or a promise of an advantage, a service, or a thing of value to commit the murder.

g. The murder was committed for the purpose of receiving money or a thing of value.

<sup>376</sup>The rules pertaining to capital referrals are contained in R.C.M. 201(f)(2)(C).

<sup>377</sup>R.C.M. 1004(b)(1).

<sup>378</sup>R.C.M. 1004(b)(6).

<sup>379</sup>R.C.M. 1004(b)(7).

<sup>380</sup>R.C.M. 1004(b)(4)(B).

<sup>381</sup>R.C.M. 1004(b)(8).

<sup>382</sup>The types of punishment listed in R.C.M. 1003 are the *only* punishments which may legally be imposed at a court-martial. Courts-martial may not impose administrative discharges such as a "general discharge" or a discharge under "other than honorable conditions." R.C.M. 1003(b). *See also* United States v. Phipps, 12 C.M.A. 14, 30 C.M.R. 14 (1960).

<sup>383</sup>R.C.M. 1003(b)(10)(A).

<sup>384</sup>R.C.M. 1003(b)(10)(B).

<sup>385</sup>R.C.M. 1003(b)(10)(C).

<sup>386</sup>R.C.M. 1003(b)(10)(A).

dismissal,<sup>385</sup> but it may award a dismissal for *any* UCMJ violation.<sup>386</sup>

Noncommissioned warrant officers and enlisted personnel may be separated by dishonorable discharge<sup>387</sup> if convicted of an offense carrying a dishonorable discharge as part of the maximum punishment<sup>388</sup> and if tried by general court-martial.<sup>389</sup>

Only enlisted members may receive a bad-conduct discharge.<sup>390</sup> A bad-conduct discharge may be imposed for offenses authorized a punitive discharge if the accused is convicted at a general court-martial or at a special court-martial empowered to adjudge a bad-conduct discharge.<sup>391</sup>

### C. DEPRIVATION OF LIBERTY

There are only four types of deprivation of liberty which may be imposed by a court-martial:<sup>392</sup> confinement;<sup>393</sup> hard labor without confinement;<sup>394</sup> confinement on bread and water or diminished rations;<sup>395</sup> and restriction to specified limits.<sup>396</sup>

A court-martial may sentence an accused to confinement but may not specify the place of confinement.<sup>397</sup> A commissioned officer may be confined only by a general court-martial.<sup>398</sup> Although the 1984 Manual eliminated the phrase "at hard labor" from this form of punishment, "confinement" may properly include hard labor.<sup>399</sup>

Hard labor without confinement, for up to three months, may be imposed on enlisted soldiers.<sup>400</sup> The accused's commanding

<sup>385</sup>UCMJ art. 19; UCMJ art. 20.

<sup>386</sup>R.C.M. 1003(b)(10)(A).

<sup>387</sup>R.C.M. 1003(b)(10)(B).

<sup>388</sup>The maximum punishment authorized for each offense is found in MCM, 1984, part IV.

<sup>389</sup>UCMJ art. 19; UCMJ art. 20.

<sup>390</sup>R.C.M. 1003(b)(10)(C).

<sup>391</sup>Procedural prerequisites which must be met before a special court-martial may adjudge a bad-conduct discharge are outlined in UCMJ art. 19.

<sup>392</sup>R.C.M. 1003(b). A court-martial may not impose correctional custody, extra duty, or extra training as a punishment. *See, e.g., United States v. Miller*, 17 M.J. 817 (A.C.M.R. 1984).

<sup>393</sup>R.C.M. 1003(b)(8).

<sup>394</sup>R.C.M. 1003(b)(7).

<sup>395</sup>R.C.M. 1003(b)(9).

<sup>396</sup>R.C.M. 1003(b)(6).

<sup>397</sup>R.C.M. 1003(b)(8).

<sup>398</sup>R.C.M. 1003(c)(2)(A)(ii).

<sup>399</sup>R.C.M. 1003(b)(8) discussion.

<sup>400</sup>R.C.M. 1003(b)(7).

officer designates the "hard labor" which is performed in addition to the soldier's regular duties.<sup>401</sup>

Enlisted soldiers attached to, or embarked in, a vessel may be sentenced to confinement on bread and water, or confinement on diminished rations, for up to three days.<sup>402</sup> A medical officer's approval must be obtained before the punishment may be executed.<sup>403</sup>

An accused may be sentenced to restriction for up to two months.<sup>404</sup> When a court-martial adjudges restriction, the court should specify the limits of the restriction.<sup>405</sup>

### D. DEPRIVATIONS OF PAY

Only two forms of deprivation of pay may be imposed as a court-martial punishment:<sup>406</sup> forfeiture of pay and allowances,<sup>407</sup> and fines.<sup>408</sup>

A forfeiture of pay and allowances deprives an accused of pay and allowances as they accrue.<sup>409</sup> It cannot be applied retroactively. If the court imposes partial forfeitures the forfeitures apply only to basic pay,<sup>410</sup> and they must be adjudged as an exact amount of dollars to be forfeited each month for a specified number of months.<sup>411</sup> Total forfeitures may apply to basic pay and to all allowances.<sup>412</sup> As a matter of policy an accused who is not serving confinement and is not dismissed from the service

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<sup>401</sup>R.C.M. 1003(b)(7) discussion.

<sup>402</sup>R.C.M. 1003(b)(9).

<sup>403</sup>R.C.M. 1003(b)(9) discussion.

<sup>404</sup>R.C.M. 1003(b)(6).

<sup>405</sup>R.C.M. 1003(b)(6) discussion.

<sup>406</sup>R.C.M. 1003(b). *United States v. Massey*, 12 M.J. 683 (A.C.M.R. 1983). Detention of pay is not an authorized court-martial punishment.

<sup>407</sup>R.C.M. 1003(b)(2).

<sup>408</sup>R.C.M. 1003(b)(3).

<sup>409</sup>R.C.M. 1003(b)(2) discussion.

<sup>410</sup>R.C.M. 1003(b)(2); *United States v. Humphrey*, 14 M.J. 661 (A.C.M.R. 1982); *United States v. Mahone*, 14 M.J. 521 (A.F.C.M.R. 1982).

<sup>411</sup>R.C.M. 1003(b)(2). If the adjudged sentence does not include the phrase "per month" the amount announced is the total amount to be forfeited. *United States v. Henderson*, 21 M.J. 853 (A.C.M.R. 1986) ("Forfeiture of \$413 pay for three months" resulted in a one-time forfeiture of \$413.00); *United States v. Davis*, SPCM 20417 (A.C.M.R. 23 Apr. 1984); *United States v. Walker*, 9 M.J. 892 (A.F.C.M.R. 1980).

*But see* *United States v. Datema*, SPCM 21367 (A.C.M.R. 27 Sept. 1985) (omission of "per month" not fatal where record clearly demonstrated that forfeitures were to be applied on a monthly basis); *United States v. Crandall*, SPCM 20537 (A.C.M.R. 10 July 1984) (omission of word "pay" inconsequential).

<sup>412</sup>*Id.*

cannot be deprived of more than two-thirds pay for any month unless specifically requested by the accused.<sup>413</sup>

A fine imposed by a court-martial mandates that a specific amount of money be paid when the fine is ordered executed.<sup>414</sup> At special and summary courts-martial, the total amount of fine plus forfeitures (if any)<sup>415</sup> cannot exceed the amount of forfeitures which could have been imposed.<sup>416</sup> At a general court-martial a fine can be any amount<sup>417</sup> so long as the punishment is not cruel and unusual.<sup>418</sup> Normally a fine should be reserved for cases where the accused has been unjustly enriched, but this is not a mandatory limitation.<sup>419</sup>

The accused's failure to pay a fine can result in a conversion of the fine to additional confinement if the court specifically provides for such a stipulation in the sentence;<sup>420</sup> the resultant total confinement does not exceed the maximum authorized period of confinement;<sup>421</sup> and the accused's failure to pay was not a result of his/her indigency.<sup>422</sup>

### ***E. REDUCTION IN GRADE***

Reduction to the lowest enlisted grade (or any intermediate grade) is an authorized punishment for enlisted personnel convicted by either a general or special court-martial.<sup>423</sup> An officer cannot be reduced in grade by a court-martial except in time of war.<sup>424</sup> Army enlisted soldiers convicted by court-martial are

<sup>413</sup>R.C.M. 1107(d)(2) discussion; *United States v. Nelson*, 22 M.J. 550 (A.C.M.R. 1986); *United States v. Worrell*, 3 M.J. 817 (A.F.C.M.R. 1977); *United States v. Mundy*, 44 C.M.R. 780 (N.C.M.R. 1971).

<sup>414</sup>R.C.M. 1003(b)(3) discussion.

<sup>415</sup>Special and summary courts-martial can impose a fine and forfeitures in the same case despite the apparently contradictory language in the Manual. *United States v. Harris*, 19 M.J. 331 (C.M.A. 1985).

<sup>416</sup>R.C.M. 1003(b)(3).

<sup>417</sup>*United States v. Williams*, 18 M.J. 186 (C.M.A. 1984).

<sup>418</sup>*Id.*; *United States v. Parina*, 12 M.J. 679, 684 (A.C.M.R. 1981) (a fine imposed by a general court-martial can be any amount unless it is so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances).

<sup>419</sup>R.C.M. 1003(b)(3) discussion; *United States v. Combs*, 15 M.J. 743 (A.F.C.M.R. 1983); *United States v. Ford*, 12 M.J. 636 (N.C.M.R. 1981); *United States v. Parina*, 12 M.J. 679 (A.C.M.R. 1981); *United States v. Finley*, 6 M.J. 727 (A.C.M.R. 1978).

<sup>420</sup>R.C.M. 1003(b)(3).

<sup>421</sup>See maximum sentence limitations in MCM, 1984, Part IV.

<sup>422</sup>R.C.M. 1113.

<sup>423</sup>R.C.M. 1003(b)(5).

<sup>424</sup>R.C.M. 1003(c)(2)(A)(i). During time of war an officer's sentence of dismissal may be commuted to reduction to any enlisted grade.



administratively reduced in grade to Private, E-1, if their court-martial sentence includes a punitive discharge, confinement, or hard labor without confinement.<sup>425</sup>

### ***F. REPRIMAND***

Any court-martial may include a reprimand as part of the adjudged sentence.<sup>426</sup> The convening authority determines the content of the reprimand and actually issues it in writing.<sup>427</sup>

## **X. CONCLUSION**

Contrary to popular belief getting the conviction is not the most difficult part of the trial counsel's job. The facts will usually determine the outcome of the case on the merits. The true challenge is to insure that the accused receives the appropriate punishment for the crime. Historically the sentencing phase of the trial has been the "defense counsel's show." The 1984 Manual and recent case law developments have swung the pendulum the other way. Trial counsel have broad latitude to present relevant sentencing evidence during the case in aggravation. If the defense presents matters in extenuation and mitigation trial counsel should be prepared to take advantage of the open door through effective cross-examination and anticipation of the case in rebuttal. Trial counsel who "roll over" on sentencing and who don't protect the record do a disservice to themselves, their clients, and the Army. "Seeking justice" includes the obligation to zealously represent the interests of the command. Those interests are vindicated only when counsel thoroughly prepare and "go for the jugular" at trial.

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<sup>425</sup>UCMJ art. 58(a).

<sup>426</sup>R.C.M. 1003(b)(1).

<sup>427</sup>*Id.*

## APPENDIX A

UNITED STATES V. \_\_\_\_\_

INTERVIEWER: \_\_\_\_\_

TIME/DATE: \_\_\_\_\_

LOCATION: \_\_\_\_\_

1. NAME: \_\_\_\_\_

UNIT: \_\_\_\_\_

DEROS: \_\_\_\_\_

PHONE: \_\_\_\_\_

IF WL/90 DAYS \_\_\_\_\_

NEW UNIT: \_\_\_\_\_

2. DO YOU KNOW THE ACCUSED? YES NO  
 HOW LONG HAVE YOU KNOWN HIM? \_\_\_\_\_  
 WHAT IS YOUR DUTY POSITION WITH REGARD TO THE ACCUSED? \_\_\_\_\_  
 WHAT TYPE OF CONTACT DO YOU HAVE WITH THE ACCUSED? DAILY  
 OTHER: \_\_\_\_\_  
 DO YOU HAVE CONTACT WITH HIM SOCIALLY? YES NO HOW OFTEN: \_\_\_\_\_

3. WHAT IS YOUR OPINION OF THE ACCUSED? \_\_\_\_\_

4. HOW WOULD YOU RATE HIS DUTY PERFORMANCE? \_\_\_\_\_

HOW WOULD YOU RATE HIM AS A FIELD SOLDIER? \_\_\_\_\_

WOULD YOU TAKE HIM INTO COMBAT? \_\_\_\_\_

WORST AVERAGE BEST

5. IS THE ACCUSED DEPENDABLE? YES NO RATING: 1 2 3 4 5 6 7 8 9 10

DOES HE SHOW INITIATIVE? YES NO 1 2 3 4 5 6 7 8 9 10

DOES HE KNOW HIS JOB? YES NO 1 2 3 4 5 6 7 8 9 10

IS HE COOPERATIVE? YES NO 1 2 3 4 5 6 7 8 9 10

DOES HE RESPECT AUTHORITY? YES NO 1 2 3 4 5 6 7 8 9 10

WOULD YOU BELIEVE HIM

UNDER OATH? YES NO

HAS HE EVER LIED TO YOU? YES NO

IS HE HONEST? YES NO

IF SO, ABOUT WHAT? \_\_\_\_\_

6. HAVE YOU EVER RECOMMENDED HIM FOR PROMOTION? YES NO, IF SO, WHEN? \_\_\_\_\_

WOULD YOU RECOMMEND HIM FOR PROMOTION? YES NO WHY? \_\_\_\_\_

WOULD YOU RECOMMEND HE BE RETAINED IN THE ARMY? YES NO WHY? \_\_\_\_\_

WOULD YOU RECOMMEND HE RETURN TO THE UNIT? YES NO WHY? \_\_\_\_\_

DO YOU FEEL HE IS REHABILITABLE - SALVAGEABLE? YES NO WHY? \_\_\_\_\_

7. DO YOU THINK THE ACCUSED IS GUILTY OF THE OFFENSE(S)? YES NO I DONT  
 KNOW

WHY? \_\_\_\_\_



# TO DETERMINE AN APPROPRIATE SENTENCE: SENTENCING IN THE MILITARY JUSTICE SYSTEM

by Captain Denise K. Vowell\*

"In this whole area of sentences and sentencing, we have for too long had little serious questioning, fewer answers, and even less action. What we need more than anything else right now is thought and discussion, with a view toward change."<sup>1</sup>—Major General George S. Prugh

## I. INTRODUCTION

The crucial, and generally unasked, question about any sentencing<sup>2</sup> scheme is simply: what are we trying to accomplish in punishing offenders? Sentencing in the military justice system is reminiscent of Topsy; it apparently just grew. The Uniform Code of Military Justice,<sup>3</sup> the various Manuals for Courts-Martial,<sup>4</sup> and a myriad of appellate court decisions dealing with sentencing all

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\*Judge Advocate General's Corps, United States Army. Currently assigned as Chief, Branch IV, Government Appellate Division, U.S. Army Legal Services Agency. Formerly assigned as Chief, Criminal Law Branch, Trial Counsel, and Claims Judge Advocate, Fort Bliss, TX 1981-1985. J.D., University of Texas, 1981; B.S., Illinois State University, 1974. Completed 34th Judge Advocate Officer Graduate Course, 1986; 97th Judge Advocate Officer Basic Course, 1981; Military Police Officer Basic Course, 1975. Member of the bars of the Supreme Court of Texas, the United States Supreme Court, the United States Court of Military Appeals, and the U.S. Army Court of Military Review. This article is based upon a thesis submitted in partial satisfaction of the requirements for completion of the 34th Judge Advocate Officer Graduate Course.

<sup>1</sup>Prugh, *Evolving Military Law: Sentences and Sentencing*, *The Army Lawyer*, Dec. 1974, at 6.

<sup>2</sup>General Prugh distinguishes "sentence" from "sentencing": "The term 'sentence' connotes the imposition of a penalty on an individual found guilty of wrongdoing, by a judicial determination or decree.... The term 'sentencing' connotes the process of imposing a sentence by judicial decree." *Id.* at 1 (emphasis original). General Prugh's definitions of these terms are used throughout this paper.

<sup>3</sup>10 U.S.C. §§ 801-940 (1982) [hereinafter UCMJ].

<sup>4</sup>The Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984] established the current rules of practice and procedure in trials by court-martial. The Manual is promulgated by the President under the authority of UCMJ art. 36(a). Prior to 1920, no statutory authority existed for promulgation of any Manual for Courts-Martial. Early practice and procedure guides were treatises on military law. See, e.g., S. Benet, *A Treatise on Military Law and the Practice of Courts-Martial* (1862). Later Manuals were issued by The Judge Advocate General under the authority of the Secretary of War. See, e.g., *A Manual for Courts-Martial*, United States Army, 1917 [hereinafter MCM, 1917]. In 1920, the Articles of War, Act of June 4, 1920, ch. 227, § 11, 41 Stat. 787 (1920) [hereinafter A.W.] were amended: A.W. 38 granted the President the power to prescribe rules of procedure for Army courts-martial.

fail to clearly define the purposes and goals of sentencing in the military.<sup>5</sup> This failure has several consequences for the military justice system. First, without goals for sentencing offenders defined either by statute or regulation, the appellate courts are free to impose their own goals and means of implementing them on the military<sup>6</sup>, with sometimes ill-conceived results.<sup>7</sup> This allows the courts to define the purpose of military justice and significantly reduces the President's role in military discipline. Whether they do an appropriate job is not the point; the responsibility for setting these goals rests squarely with the President and the Congress.<sup>8</sup> That responsibility has been largely abdicated.

Second, undefined goals are difficult to critique. Once the purposes of the sentencing process have been established, we can question whether the goals are permissible and whether the punishment scheme accomplishes those goals. For example, rehabilitation has been long recognized as a primary goal of punishment in the civilian sector,<sup>9</sup> but has come under increasing criticism, pri-

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<sup>5</sup>None of these sources provide a definitive sentencing philosophy for the military justice system. The judicially selected philosophies, as will be seen *infra*, part IV are more often judge's interpretations of what they believe sentencing philosophy should be rather than what it is. Other sources of sentencing philosophy include Dep't of Army, Reg. No. 190-47, Military Police, United States Army Correction System, (Nov. 1978) [hereinafter AR 190-47], which indicates that rehabilitation of offenders is the principal goal of the Army corrections program. Dep't of Army, Pamphlet No. 27-9, Military Judges' Benchbook, para. 2-59 (May 1982) (C1, 15 Feb. 1985) [hereinafter Benchbook, 1985] provides the following instruction for the court members:

MJ: Our society recognizes five principal reasons for the sentence of those who violate the law. They are:

1. Protection of society from the wrongdoer.
2. Punishment of the wrongdoer.
3. Rehabilitation of the wrongdoer.
4. Preservation of good order and discipline in the military.
5. The deterrence of the wrongdoer and those who know of his/her crime and his/her sentence from committing the same or similar offenses.

<sup>6</sup>Both the Model Sentencing and Corrections Act (1985) [hereinafter Model Act] and the ABA Standards for Criminal Justice, Sentencing Alternatives and Procedures (2d ed. 1980) [hereinafter ABA Sentencing Standards] recognize that setting standards for sentencing is a legislative function; applying those standards in individual cases is a judicial one.

<sup>7</sup>See *infra* text accompanying notes 291-322.

<sup>8</sup>U.S. Const. art. I, § 8 charges Congress with the responsibility for establishing rules governing the land and naval forces. The President has inherent authority over the armed forces by virtue of his position as Commander-in-Chief, (U.S. Const. art. II, § 2) as well as authority delegated to him by Congress through UCMJ art. 36(a).

<sup>9</sup>See, e.g., National Institute of Justice, Sentencing Reform in the United States: History, Content, and Effect (1985) at 4-6 [hereinafter Sentencing Reform in the U.S.].

marily on the ground that rehabilitation of offenders through incarceration and parole simply has not worked.<sup>10</sup> As a result, the recent revisions to the federal sentencing system have de-emphasized rehabilitation as a purpose for incarcerating offenders.<sup>11</sup>

Third, once a philosophical framework for sentencing has been established, collateral aspects of the sentencing procedure can be measured against that framework by asking: does this procedural rule or that evidentiary requirement aid us in meeting our goals? One of the most serious deficiencies of the military justice system has been the promulgation of Manual provisions and regulations which affect sentencing, but neither enhance the goals of the sentencing process nor provide sufficient information to, in the language of MCM, 1984, "aid the court-martial in determining an appropriate sentence."<sup>12</sup> The current rules for admissibility of evidence at the sentencing phase of a court-martial are an attempt to engraft the full measure of constitutional due process<sup>13</sup> and confrontation<sup>14</sup> protections from the findings phase without ever determining if such protections are either essential to our system of justice or constitutionally required.

This article addresses the issues raised above through an historical analysis of the purpose of punishment in the military justice system, as discerned from appellate court decisions and various military publications, and an examination of how sentencing rules and procedures have accomplished those goals. The elimination of sentencing by court members will be treated in an abbreviated fashion. In view of the recommendations of The

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<sup>10</sup>See Model Act, *supra* note 6, § 3-102(5), and comment thereto; American Friends Service Committee, *Struggle for Justice* (1971) (a radical critique of sentencing) [hereinafter *Struggle for Justice*]; Martinson, *What Works—Questions and Answers About Prison Reform*, 35 Pub. Interest 22 (Spring 1974). The commentary to the ABA Sentencing Standards § 18-2.2 provides this perspective on the demise of rehabilitation as a justification for punishment: "The evaluation that a rehabilitative model for sentencing has been a noble experiment but one that has largely failed is reached with considerable reluctance."

<sup>11</sup>The Sentencing Reform Act of 1984, Chapter 11 of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, legislatively prescribes appropriate purposes for sentencing offenders. Rehabilitation of the offender is an accepted purpose in determining the initial sentence, but release dates are no longer keyed to whether the inmate has been "rehabilitated," as parole is abolished by the Act. See also Kennedy, *The Sentencing Reform Act of 1984*, 32 Fed. B. News & J. 62 (1985). Senator Kennedy was one of the principal sponsors of the Sentencing Reform Act of 1984.

<sup>12</sup>MCM, 1984, Rule for Court-Martial 1001[hereinafter R.C.M. 1001].

<sup>13</sup>U.S. Const. amend. V.

<sup>14</sup>U.S. Const. amend. VI.



Military Justice Act of 1983 Advisory Commission,<sup>15</sup> fundamental change in this area is unlikely. The special, complex issues raised by sentencing in capital cases will not be addressed.

While comparisons to the federal sentencing system will be made, particularly in the area of presentence investigative reports<sup>16</sup> and the procedures for presenting evidence to the sentencing judge,<sup>17</sup> this article does not endorse adoption of the federal sentencing system. Although article 36(a) of the UCMJ suggests that the principles of law and rules of evidence in the federal courts be followed in courts-martial,<sup>18</sup> the President may determine that wholesale adoption of federal procedures is simply not practical.<sup>19</sup> A number of differences between the military and civilian justice systems militate against such a practice, not the least of which is the difference in their fundamental purposes:

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<sup>15</sup>The Military Justice Act of 1983 Advisory Commission Report [hereinafter Adv. Comm. Rep.] recommended against adopting the civilian model of sentencing by judge alone in all noncapital cases. 1 Adv. Comm. Rep. at 10. Two members of the commission dissented. *Id.* In view of the controversial nature of this issue, the opposition to removing sentencing authority from the members of both convening authorities and defense counsel (see 2 Adv. Comm. Rep. at 368), and the Commission's recommendation, it is highly unlikely that this proposal will be adopted.

<sup>16</sup>Fed. R. Crim. P. 32(c). See also Probation Div., Admin. Office of the U.S. Courts, Pub. No. 105, The Presentence Investigative Report (1984) [hereinafter Presentence Inves. Rep.].

<sup>17</sup>Fed. R. Crim. P. 32(c).

<sup>18</sup>10 U.S.C. § 836(a) (1982) provides:

Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

<sup>19</sup>*Id.* Courts-martial try cases under circumstances entirely different from those in federal district courts; many military offenses have no civilian counterparts. The federal practice, with its more intricate procedures, is not necessarily better, particularly when the differences in purpose of the two systems are considered. As two critics of the adoption of the federal model note:

It does little good to bow to the majesty of legal procedural gloss if, when all is done, the organization is still manned by drug addicts and incapable of battle or is still manned by lawless men who, on the battlefield, rape, rob and pillage. The view, apparently vested with popular support both within and without the Department of Defense, which sees the wholesale assimilation of civilian criminal law by the military society, whether in one large dose or by piecemeal efforts and without regard to the environment in which the assimilated law is to function, constitutes a royal invitation to a command performance in a disaster.

1 Adv. Comm. Rep., *supra* note 15, at 56 (Minority report of C. Mitchell & E.M. Byrne).

Punishment in the military, while it bears much similarity to civilian court punishment, is different in important ways. Although some offenders who are punished by civilian courts work for the government, they are not brought before those courts because of their status as governmental workers. All civilian defendants appear simply as persons accused of a crime. Civilian courts punish to deter, rehabilitate, and promote respect for law, not to enhance the efficiency of governmental services. Military punishment does involve some of the same goals as civilian punishment. But military punishment is different to the extent that it furthers discipline and enables the military to fulfill its mission of national defense.<sup>20</sup>

Federal practices will be examined to determine their ability to enhance the quality of military justice. Our system should not be changed simply to conform to federal practice, nor should it be maintained as it is simply to keep our distance from the mainstream of federal criminal practice; rather, the military sentencing procedures must be evaluated based on their ability to effectuate the legitimate ends of military justice: to enhance discipline and maintain order.

In view of the atmosphere of reform permeating federal sentencing practice, the time has come for a review of the rationales for and methods of sentencing in the military. Whether extensive changes are needed is a question that can only be answered after a review of how our sentencing practices originated, the purposes they serve, and how well they serve them.

## II. PHILOSOPHIES OF SENTENCING

### A. INTRODUCTION

No one seriously questions the need for punishing offenders.<sup>21</sup>

<sup>20</sup>1 Adv. Comm. Rep., *supra* note 15, at 6. A contrary view is expressed in a minority report on the issue of sentencing by military judge alone: "The tension described above [between military judges and commanders] is based on a fundamental misapprehension as to the nature of a court-martial sentence. It is a criminal judgement of a court of the United States, not an expression of the will of the command or its officers in disciplinary matters." *Id.* at 40 (Minority report by Sterritt) Mr. Sterritt is eloquent, but it is he who is mistaken about the fundamental nature of a court-martial sentence; it is both a criminal judgement, and a means to foster discipline in the command.

<sup>21</sup>There is considerable debate, however, over the types of punishment which can or should be imposed. Capital punishment is an obvious area of controversy. The use of prisons has been challenged on both ethical and practical grounds. See *Struggle for Justice*, *supra* note 10.

Even anarchists accept the concept of punishment; they simply see it as a matter for self-help, rather than a legitimate exercise of state authority. Society's justifications for punishing offenders have evolved two major philosophies of punishment: the retributivist theory, as proposed by Immanuel Kant,<sup>22</sup> and the utilitarian theory, as represented by Jeremy Bentham.<sup>23</sup>

### B. THE RETRIBUTIVIST PHILOSOPHY

Retributivist theory applies a law of equal punishment—the *lex talionis* of the Old Testament. A breach of law can be remedied only by restoration of the status quo or by an equal reaction against the offender: "eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, stripe for stripe."<sup>24</sup> Under pure retributivist theory, punishment is determined solely by the nature of the offense; considerations of the status of the offender, questions of extenuation and mitigation, or the needs of society are irrelevant:

Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else. . . .<sup>25</sup>

The law is made whole only by adequate punishment.

Retributivist theory is easy to apply: a set penalty for each offense for every offender. Since it admits no end other than restoration of the law, it cannot be critiqued on the basis of its effectiveness. The sentence is based solely on the offense; all thieves, for example, would receive the same punishment: a requirement to make their victims whole. The modern counterpart to the retributivist philosophy is frequently known as a "just deserts" philosophy of punishment.<sup>26</sup> Determinate, or fixed sentencing, is the method of implementing this sentencing philoso-

<sup>22</sup>I. Kant, *The Metaphysical Elements of Justice* (J. Ladd trans. 1965).

<sup>23</sup>J. Bentham, *An Introduction to the Principles of Morals and Legislation*, (1789).

<sup>24</sup>*Exodus* 22:24-25 (King James).

<sup>25</sup>I. Kant, *supra* note 22, at 99.

<sup>26</sup>Just deserts (or retribution) is selected as the major factor in sentencing decisions by the Model Act, art. 3. There is a subtle distinction between retribution and just deserts: "Hence punishment must be guided by the notion of desert, a less emotionally charged designation than the more familiar concept of retribution." C. Silberman, *Criminal Violence, Criminal Justice* 189 (1978).

phy.<sup>27</sup> Of course, determinate sentencing is not purely retributivist in character, since all determinate sentencing schemes consider some aspects of the status of the offender, such as mental responsibility.<sup>28</sup> The acceptance of retribution as a legitimate goal of punishment has clearly been influenced by public opinion: the belief that criminals should pay for their crimes. Two aspects of retributivist philosophy which have been incorporated into the revision of the federal law deserve further comment: victim assistance programs and collateral sentencing orders.

Crime victims received considerable Congressional attention beginning in 1982 with the passage of the Victim and Witness Protection Act.<sup>29</sup> The Act provides stiff penalties for tampering with or retaliating against a victim.<sup>30</sup> The Attorney General was directed to prepare guidelines for all federal law enforcement agencies to protect the rights of victims of crime.<sup>31</sup> The Comprehensive Crime Control Act of 1984<sup>32</sup> included the Witness Security Reform Act of 1984<sup>33</sup> which was designed to further improve the treatment of victims and witnesses in the federal system. The Act provides for extensive witness relocation programs<sup>34</sup> and a compensation fund for victims.<sup>35</sup>

Victims have little direct impact on the sentence, except when restitution is ordered, but may have an impact on the sentencing process in the use of victim impact statements. The presentence investigative report must include a section detailing "any harm, including financial and social, psychological, and physical harm done to or loss suffered by any victim of the offense; and any

<sup>27</sup>There is a clear trend toward determinate or fixed sentences in both the state and federal arenas. See Sentencing Reform in the U.S., *supra* note 9.

<sup>28</sup>The Sentencing Reform Act of 1984, Pub. L. No. 98-472, 98 Stat. 1987, the Model Act, and the ABA Sentencing Standards all propose a sentencing commission to establish guidelines for sentencing that incorporate extenuating and aggravating factors in determining the punishment range for each offense.

<sup>29</sup>Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified in 18 U.S.C.).

<sup>30</sup>18 U.S.C. § 1512(a) (1982) permits sentences of up to 10 years if intimidation, threats or force are used.

<sup>31</sup>Pub. L. 97-291, § 6, 18 U.S.C. § 1512 note (Supp. III 1985). State laws implementing similar programs are discussed in Anderson and Woodard, *Victim and Witness Assistance: New State Laws and the System's Response*, 68 *Judicature* 221 (1985). The armed services have implemented the Victim and Witness Protection Act by regulations establishing programs to assist victims and witnesses. See, e.g., Dep't of Army, Reg. No. 27-10, *Legal Services—Military Justice* (10 Dec. 1985) ch. 18 [hereinafter AR 27-10].

<sup>32</sup>Pub. L. 98-473, 98 Stat. 1976 (1984).

<sup>33</sup>18 U.S.C. §§ 3521-3528 (Supp. III 1985).

<sup>34</sup>18 U.S.C. § 3521 (Supp. III 1985).

<sup>35</sup>18 U.S.C. § 3525 (Supp. III 1985).

other information that may aid the court in sentencing....<sup>36</sup> The retributivist philosophy's focus on the nature of the offense is served by focusing the court's attention on the impact of the crime on the victim, for within the statutory classifications of offenses, there are differing degrees of harm. Just deserts sentencing requires that the nature of the punishment be tied to the nature of the crime.<sup>37</sup>

Collateral sentencing orders increase the range of penalties available to the sentencing judge. The Comprehensive Crime Control Act allows the sentencing judge to order restitution to victims, even when the offender is imprisoned.<sup>38</sup> This offers little help for the victims of the impecunious offender,<sup>39</sup> although the crime victims fund, also established by the Comprehensive Crime Control Act, may provide some relief.<sup>40</sup> The offender may also be required to give notice to victims of a conviction for fraud or deceptive practices.<sup>41</sup> Restitution provisions are integral to the retributivist sentencing philosophy of making the victim whole.

An additional justification for the trend toward determinate sentencing under a just deserts philosophical framework is the disturbing problem of sentence disparity.<sup>42</sup> Predicting the length of sentence required to "rehabilitate" an offender involves either prescience or the use of guidelines developed in previous cases, which are frequently over-inclusive, that is, they overestimate the likelihood of recidivism, and are often based on socio-economic factors that have a disproportionately heavy impact on racial minorities.<sup>43</sup>

<sup>36</sup>Fed. R. Crim. P. 32(c)(2)(B). This provision was added by the Victim and Witness Protection Act of 1982. One drawback to this procedure, from the standpoint of the victim at least, is that the information contained in the impact statement will probably be provided to the defendant. See also Presentence Inves. Rep., *supra* note 16, for an example of a victim impact statement.

<sup>37</sup>C. Silberman, *supra* note 26.

<sup>38</sup>18 U.S.C. § 3556 (Supp. III 1985). The law prior to 1984 permitted restitution orders only as a condition of probation. 18 U.S.C. § 3651 (1976) (repealed 1984).

<sup>39</sup>Restitution orders may not exceed the ability of the offender to pay. 18 U.S.C. § 3553 (Supp. III 1985).

<sup>40</sup>42 U.S.C. §§ 10601-04 (Supp. III 1985). The vast majority of the funds collected for this purpose are designated for grants to state victim assistance programs.

<sup>41</sup>18 U.S.C. § 3555 (Supp. III 1985).

<sup>42</sup>The ABA Sentencing Standards and the Model Act, *supra* note 6, both cite sentence disparities as a reason for adopting determinate sentencing. Senator Kennedy, one of the principal sponsors of the Sentencing Reform Act of 1984, has indicated that concern over the sentencing disparities among federal judges was a primary reason for adoption of the act. Kennedy, *supra* note 11. See also Sentence Reform in the U.S., *supra* note 9, for some explanations of the state trend toward determinate sentencing.

<sup>43</sup>See, e.g., Wilson, Thinking About Crime (1975).

### C. UTILITARIAN PHILOSOPHY

A variety of rationales with a more individualized focus for sentencing can be grouped within the utilitarian approach to punishment:

The immediate principal end of punishment is to control action. This action is either that of the offender, or of others: that of the offender it controls by its influence, either on his will, in which case it is said to operate in the way of *reformation*; or on his physical power, in which case it is said to operate by *disablement*: that of others it can influence no otherwise than by its influence over their wills; in which case it is said to operate in the way of *example*.<sup>44</sup>

The concept of proportionality is also relevant to the utilitarian philosophy of punishment: punishment should fit the offense, if only to encourage those bent on committing some type of crime to choose a less serious one.<sup>45</sup> More modern versions of the utilitarian philosophy include rehabilitation, incapacitation, deterrence (both individual and general), and denunciation. While an in-depth analysis of sentencing philosophies is beyond the scope of this article, a brief explanation of these philosophies will be useful.

While rehabilitation has fallen into some disfavor as a justification for sentencing offenders,<sup>46</sup> it was retained as one of the factors in determining an appropriate sentence by the Sentencing Reform Act of 1984.<sup>47</sup> The American Bar Association Sentencing Standards treat rehabilitation of offenders as one aspect of the decision to punish, but indicate, "The offender's need for rehabilitation or treatment should not be considered as a justification for imposing restraints in excess of those clearly justified on other grounds."<sup>48</sup> The Model Act shifts the rehabilitation focus from purpose to goal: "The abandonment of rehabilitation as a factor in determining the nature or length of a sentence *does not* abandon rehabilitation as a goal of the correctional system."<sup>49</sup> Since we are unsure of the ability of corrections systems to reform offenders, rehabilitation has lost much of its appeal as a justification for punishment.

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<sup>44</sup>J. Bentham, *supra* note 23, at ch. XIII, p.1, n.1.

<sup>45</sup>*Id.*, ch. XIV, at 1.

<sup>46</sup>See *supra* note 10 and accompanying text.

<sup>47</sup>18 U.S.C. § 3553(2)(D) (Supp. III 1985).

<sup>48</sup>ABA Sentencing Standards, *supra* note 6, § 18-3.2(a)(v).

<sup>49</sup>Model Act, *supra* note 6, § 3, prefatory note (emphasis original).



In shifting the focus from the offender's needs to those of society, incapacitation of offenders emerges as a major justification for punishment, particularly for incarceration.<sup>60</sup> The incarcerated offender clearly has limited opportunities for continued harm to society at large,<sup>61</sup> and an incapacitation philosophy can be used to justify extremely long prison sentences. Not all offenders are recidivists, however, either from lack of motivation to commit other crimes, or from lack of opportunity. The man who strangles his wife when he finds her in bed with another man is probably not at risk of committing this crime again—unless, of course, he marries another with the same predilections as his first wife. The judge who is convicted of accepting kick-backs and is removed from office will not likely have the opportunity to commit the same crime again. Incapacitation cannot be used to justify prison sentences in either of these cases, although prison terms can certainly be otherwise justified. The real problem of incapacitation philosophy is: How much is enough? We are simply unable to predict with any degree of accuracy which bank robber or shoplifter will "go straight." Even when predictions can be made, such as in the case of the alcoholic who persists in driving while intoxicated, can life imprisonment be justified? It will certainly incapacitate; the offender will not have access to an automobile while in prison, but the punishment is probably disproportionate to the offense. Incapacitation cannot be the sole justification for punishment; degrees of harm and the nature of the offense and the offender must also be considered.

Denunciation can serve as a justification for imprisoning both the man who murders his wife, and the judge who accepts a bribe. By jailing these offenders, we express the moral outrage of society at the offenses they have committed, and discourage victims of crimes from resorting to self-help. This philosophy focuses more on the needs of society than on the individual offender. Sentencing for purposes of denouncing the offense strengthens the law, by making the law effective.

Deterrence theory has two aspects, individual and general deterrence. Individual deterrence considers the individual, why he committed the offense, and what kind of punishment will keep him from committing the same or similar offenses again. Prison sentences for the murderer and the judge are probably unnecessary to deter him from committing like offenses. A prison

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<sup>60</sup>The death penalty is the ultimate in incapacitation.

<sup>61</sup>The problem of crime in prisons is another issue entirely. See C. Silberman, *supra* note 26, at ch. 10, and citations thereto.

sentence for the drunk driver might deter, and a brief term of imprisonment for a successful businessman who is two months behind on his child support payments is very likely to deter him from falling behind once again. To be successful in changing behavior, this type of deterrence must focus on the individual offender, and make predictions about his response to the penalties available, an extremely difficult task.

General deterrence considers the impact the sentence given a particular individual will have on others—a preventive rationale for sentencing. The effectiveness of general deterrence has been seriously questioned, particularly in the capital punishment debate,<sup>52</sup> but also with regard to less serious sentences. Charles Silberman responds to such critics:

Unless a deterrent is 100 percent effective, there will always be some people who are not deterred. The fact that they are not tells only that, for them, the threat of punishment was ineffective; it tells us nothing about the number of people who might have committed a crime in the absence of the threat. In any case, punishing a few violators makes the threat of punishment credible to the many; the sight of but one or two police cars handing out tickets is enough to persuade most motorists to slow down.<sup>53</sup>

The offenses committed by the husband, the judge, the alcoholic, and the businessman behind on his child support payments all carry some potential for general deterrence—the crime of passion to a lesser degree and the child support offense to a greater one. The primary criticism of general deterrence is that it inflicts punishment on an individual based on factors other than his own offense, for the purpose of influencing others, and thus benefiting society. Denunciation can be similarly critiqued. Whether the individual needs punishment is not relevant; the issue is whether society needs to impose punishment to foster respect for that particular law and to limit vigilante justice. The real issue in the use of general deterrence as a basis for punishment is one of limits: to what extent can or should the need to deter potential offenders be used as a basis for punishing a particular individual?

<sup>52</sup>See *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (A. Blumstein, J. Cohen, and D. Nagin, eds. 1978) and Erlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 *Am. Econ. Rev.* 397 (1975) for views from each side of the debate on the deterrent effect of capital punishment.

<sup>53</sup>C. Silberman, *supra* note 26, at 190.

The answer lies in the desire of society to discourage the commission of particular offenses. A society plagued by drunk drivers can justify sentencing for general deterrence more readily than a society without this particular problem.

In *A Theory of Criminal Justice*, Hyman Gross proposes a variation of several theories of punishment, primarily deterrence and denunciation, one he calls "anti-impunity."<sup>54</sup> He describes the basis of his philosophy:

[P]unishment for violating the rules of conduct laid down by the law is necessary if the law is to remain a sufficiently strong influence to keep the community on the whole law-abiding and so to make possible a peaceable society.... The threats are not laid down to deter those tempted to break the rules, but rather to maintain the rules as a set of standards that compel allegiance in spite of violations by those who commit crimes. In short, the rules of conduct laid down in the criminal law are a powerful social force upon which society is dependent for its very existence, and there is punishment for violation of these rules in order to prevent the dissipation of their power that would result if they were violated with impunity.<sup>55</sup>

### **D. CRITIQUES OF SENTENCING PHILOSOPHIES AND SOME PROPOSED SOLUTIONS**

Each of the theories of punishment discussed has deficiencies. Incapacitation and rehabilitation cannot, standing alone, serve as the basis for a just sentencing system, the first on the grounds that some of the guilty would completely escape punishment, and the second because of its present general ineffectiveness. Individual deterrence, like rehabilitation, can be critiqued based on our inability to predict with any degree of accuracy what punishments will change behavior, or indeed, when an individual's behavior has been sufficiently modified so as to present no danger to society. General deterrence theory also suffers from a lack of predictability, as well as from its lack of focus on the wrongdoer. Retribution and just deserts fail to consider the culpability of the offender and the degree of dangerousness he represents to society: within the class of those who have killed another accidentally, we

<sup>54</sup>H. Gross, *A Theory of Criminal Justice* 400-12 (1979).

<sup>55</sup>*Id.* at 400-401.

may want to distinguish among the speeder who kills a pedestrian; the two teenagers playing "chicken" on a deserted road; and the man who shoots his best friend in a hunting accident. Retribution's emphasis on making the punishment fit the crime ignores the valid consideration of tailoring the punishment to fit the offender as well. While we may not be able to predict which thief will steal again with any degree of accuracy, we can make moral judgments about relative culpability within statutory classifications of crime. The man who steals to feed his family is surely less "deserving" of punishment than the one who steals for the thrill of it. While the offense may be the same the motivations are not; this factor must be reflected in a just system of punishment.

The difficulties in each individual philosophy of punishment are reduced when punishment is not justified on the basis of any one philosophy, but rather, on a combination of philosophies.<sup>56</sup> One proposal for what is styled "a just and effective sentencing system"<sup>57</sup> recommends the use of four criteria in sentencing: deterrence (general and individual),<sup>58</sup> incapacitation,<sup>59</sup> rehabilitation,<sup>60</sup> and denunciation.<sup>61</sup> These factors would be used not only

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<sup>56</sup>The introduction to the ABA Sentencing Standards takes the position: "No one reason or purpose, standing alone, can satisfactorily supply a comprehensive theory of punishment."

<sup>57</sup>P. O'Donnell, M. Churgin, & D. Curtis, *Toward a Just and Effective Sentencing System* (1977) [hereinafter O'Donnell, Churgin & Curtis].

<sup>58</sup>O'Donnell uses the term "special deterrence" in this proposal to refer to general deterrence:

a. whether a reasonable possibility exists that the criminal behavior for which the defendant is being sentenced can be deterred by incarceration;

b. whether a reasonable possibility exists that failure to penalize such behavior by incarceration will result in a substantial increase in similar criminal behavior on the part of others;

c. whether, on the basis of the nature and circumstances of the offense and the characteristics and circumstances of the defendant, a substantial probability exists that the defendant will abstain from criminal behavior if not sentenced to a term of imprisonment.

*Id.* at 45.

<sup>59</sup>Incapacitation can only be justified under this system after considering whether probation is sufficient incapacitation; whether, due to the nature and circumstances of the offense, the defendant will have the opportunity to repeat his crime; and whether the defendant's physical or mental condition will render him unlikely to repeat the offense. *Id.* at 45-46.

<sup>60</sup>The proposed criteria limit sentences for rehabilitative purposes to no more than 24 months, and require the sentencing judge to find "compelling need" for incarceration; to consider whether incarceration can best accomplish rehabilitation, and to consider the availability of rehabilitative programs tailored to the defendant's needs. *Id.* at 47.

<sup>61</sup>Imprisonment solely for denunciative purposes is limited to those cases where the court finds clear and convincing evidence of a need for it; such sentences would be subject to review for abuse of discretion. *Id.* at 48-49.

by judges in imposing a sentence,<sup>62</sup> but by a sentencing commission to establish authorized ranges of punishment for each offense. This proposal is designed to limit the unfettered discretion of sentencing judges by providing statutory guidance in how and why to sentence offenders.<sup>63</sup>

This proposal bears a striking similarity to the recently adopted reforms in federal sentencing practice—not surprising, in view of the fact that *Towards a Just and Effective Sentencing System* was written in support of the original version of the Sentencing Reform Act first introduced in 1977.<sup>64</sup> The Sentencing Reform Act requires the court to consider the following in determining a sentence:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
  - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant; and
  - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a)(1) and that are in effect on the date the defendant is sentenced;
- (5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 944(a)(2) that is in effect on the date the defendant is sentenced; and

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<sup>62</sup>The sentence imposed would be the longest sentence required by any one of the four criteria; the sentences would not be aggregated. *Id.* at 52.

<sup>63</sup>*Id.* at 1-3.

<sup>64</sup>*Id.*

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.<sup>65</sup>

While the Sentencing Reform Act does not mirror the proposed criteria, particularly with regard to sentence limitations,<sup>66</sup> the philosophies of sentencing are nearly identical. Similar philosophies of sentencing are proposed in both the ABA Sentencing Standards and the Model Act.<sup>67</sup> All recommend the establishment of a sentencing commission which would determine punishment ranges for offenses. The Salient Factor Score used by the U.S. Parole Commission to determine parole release dates is an example of the type of sentencing range which would be provided to the sentencing judge to guide his discretion in choosing an appropriate sentence.<sup>68</sup> The adoption of these types of guidelines has engendered some criticism, primarily on the grounds that the guidelines are still "predictive scales" which consider such factors as prior offenses, prior probation revocations, whether restitution was made, and the age of the offender,<sup>69</sup> and suffer from over and

<sup>65</sup>18 U.S.C. 3553 (Supp. III 1985).

<sup>66</sup>The Act does not limit sentences imposed for rehabilitative purposes to 24 months, for example. See *supra* note 60.

<sup>67</sup>ABA Sentencing Standards, *supra* note 6, § 18-3.2 and Model Act, *supra* note 6, §§ 3-101 to -102. The principal difference between the federal code and the approaches taken by the ABA Sentencing Standards and the Model Act is the weight given to rehabilitation as a purpose for sentence. Compare § 3-102(5)-(6) of the Model Act:

(5) The potential or lack of potential for the rehabilitation or treatment of the defendant should not be considered in determining the sentence alternative or length of term to be imposed. . . . (6) The prediction of the potential for future criminality by a particular defendant, unless based on prior criminal conduct or acts designated as a crime under the law, should not be considered in determining his sentence alternative or the length of term to be imposed.

and § 18-3.2(v)-(vi) of the ABA Sentencing Standards: "(v) The offender's need for rehabilitation or treatment should not be considered as a justification for imposing restraints in excess of those clearly justified on other grounds. . . . (vi) The offender's predicted likelihood of recidivism is too speculative a concept to be considered at sentencing. . . ." with 18 U.S.C. §§ 3553(a)(1) and (2)(D).

<sup>68</sup>The Salient Factor Score is currently provided to the sentencing judge as part of the presentence report. The score is computed using a number of variables, rating both the offense and the offender. Offender characteristics include education level, marital status, and prior incarcerations. Offenses are rated according to their severity. Possession of a small amount of marijuana rates very low on the severity scale; armed robbery rates very high. An offender classed as a very good parole risk based on his personal characteristics would be paroled much sooner for an armed robbery conviction than would an offender rated a poor parole risk. See, e.g., O'Donnell, Churgin & Curtis, *supra* note 57, at 29-30.

<sup>69</sup>Coffee, *The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 Geo. L. J. 975-1053 (Apr. 1978) and Coffee, *The Future of Sentencing Reform: Emerging Legal Issues in the*



under-inclusiveness. The guidelines for the federal system are to be promulgated by April 12, 1987.<sup>70</sup>

Parole is abolished by the Sentencing Reform Act,<sup>71</sup> although limited post-release supervision is maintained.<sup>72</sup> The distinction is that an individual sentenced to three years imprisonment will serve the full three years, minus any good time credit earned.<sup>73</sup> Violations of release conditions do not result in revocation; they are prosecuted as contempt.<sup>74</sup> A factor entirely unrelated to sentencing philosophy which must be considered by the Sentencing Commission in drafting its guidelines is prison capacity.<sup>75</sup>

While the success of the approach taken in the Sentencing Reform Act certainly cannot be measured for several years, the concept of providing guidance, both in the statutory formalization of reasons for sentencing, and in the information on punishment ranges provided to the sentencing judge has a great deal of merit. Providing a framework against which sentences can be measured, both by the imposing judge and the appellate courts<sup>76</sup> should ease the tremendously difficult task of imposing a sentence,<sup>77</sup> particularly one to incarceration. Whether such a system can or should be adopted in the military will be explored in Part VI, *infra*.

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*Individualization of Justice*, 73 Mich. L. Rev. 1361, 1405-1410 (1975). In each of these articles, Professor Coffee expresses some concern about the fact that the race of the offender, while not an "official" factor in the salient factor score, effectively becomes a factor through the use of criteria such as education level, marital status, and prior convictions. See also Frankel and Orland, *Sentencing Commissions and Guidelines*, 73 Geo. L. J. 225, 231-246 (1984). Although the authors are in favor of the new federal sentencing standards, they express some concern about viewing them as a cure-all for the problems, real or imagined, within the federal system.

<sup>70</sup>Sentencing Reform Act § 235(a), 18 U.S.C. § 3551 note (Supp. III 1985). This date will probably be extended, due to the Sentencing Commission's inability to complete the drafting of the guidelines by the target date.

<sup>71</sup>Sentencing Reform Act § 218(a)(5), Pub. L. No. 98-473, 98 Stat. 2027 (1984). A five year phase-out program is provided for offenders sentenced under the old system. Pub. L. No. 98-473, 98 Stat. at 2032 (1984).

<sup>72</sup>18 U.S.C. §§ 3559, 3583 (Supp. III 1985).

<sup>73</sup>Good time credit is earned at the rate of fifty-four days for each year served. None is earned during the first year. 18 U.S.C. § 3624(b) (Supp. III 1985).

<sup>74</sup>18 U.S.C. § 3583 (Supp. III 1985).

<sup>75</sup>28 U.S.C. § 994(p) (Supp. III 1985).

<sup>76</sup>Either the government or the accused may appeal a sentence which is outside the range established by the Sentencing Commission, or one which is imposed in violation of law. 18 U.S.C. § 3742 (Supp. III 1985).

<sup>77</sup>The sentence ultimately imposed has a much greater impact on the individual than does the mere fact of conviction.

### III. PUNISHMENTS

One of the major differences between federal and military criminal law lies in the nature of the punishments permitted. Sanctions are available in courts-martial that bear no resemblance to those that may be imposed in a federal court. Perhaps more than any other factor, this illustrates the fundamental difference in purpose between the two systems of justice: the federal system exists to protect society at large; the military justice system exists to enhance discipline within the armed forces, as well as to protect society—a dual focus. The discharge sanction and reductions in grade have no federal counterpart;<sup>78</sup> they exist as punishments in order to enhance military efficiency and discipline. The two systems also employ different methods for determining punishments. The punishment range for federal offenses is set by statute.<sup>79</sup> While Congress has prescribed penalties for some UCMJ offenses, most permit such punishment “as a court-martial may direct.”<sup>80</sup> Article 56, UCMJ delegates to the President the authority to prescribe limits on punishments.<sup>81</sup> While there are other limitations on punishment within the UCMJ,<sup>82</sup> the Punitive Articles<sup>83</sup> differ from the federal criminal code in both the method

<sup>78</sup>Deportation and loss of citizenship are somewhat analogous to adjudging a punitive discharge. The individual deported is expelled from the country, but hardly with the kind of stigma attached to a punitive discharge. Deportation may be ordered for reasons which have little to do with the worth of the individual to society, but rather to the irregular method by which residence in the country was gained. Loss of citizenship certainly carries a stigma, but it is not a criminal sanction in the same sense as a punitive discharge is.

<sup>79</sup>While the sentencing range to be established in the sentencing guidelines may change the sentences imposed, it does not change the maximum authorized by statute. The sentence range places limits on the judge's discretion, but a sentence outside the range is legal (although it must be justified by the judge), so long as it does not exceed the statutory maximum. 18 U.S.C. §§ 3553, 3559 (Supp. III 1985).

<sup>80</sup>See, e.g., UCMJ art. 99. Death is the only penalty authorized for spies. UCMJ art. 106. Other articles specify death as the maximum penalty which may be imposed, but permit lesser penalties as well.

<sup>81</sup>Prior to 1890, the only limitations on punishments were those found in the Articles of War and the customs of the service. Congress gave the President the authority to prescribe limits for punishment of enlisted men by the Act of September 27, 1890, 26 Stat. 491, ch. 998, which were promulgated as Gen. Orders. No. 21, HQ of the Army (27 Feb. 1891).

<sup>82</sup>See, e.g., UCMJ art. 55: “Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.” and art. 58a (providing for reduction of any enlisted member sentenced to a punitive discharge, confinement, or hard labor without confinement).

<sup>83</sup>UCMJ arts. 77-134.

of determining the maximum sentence which may be imposed, and the types of sentences authorized.

When the Sentencing Reform Act becomes fully effective in November 1986, only four types of punishment will be authorized for individuals convicted by federal civilian courts: probation, fine, imprisonment, and the collateral sentencing orders such as restitution to victims.<sup>84</sup> Sentences imposed under the UCMJ are specifically exempted from these limitations on punishment.<sup>85</sup>

Historically, sentences for violations of the Articles of War were divided into two types: mandatory<sup>86</sup> and discretionary sentences.<sup>87</sup> In an effort to introduce some uniformity in sentencing, Congress directed the President to establish maximum sentences for those offenses for which it had not provided a mandatory penalty.<sup>88</sup> The President, in a series of Executive Orders, issued such limitations, which only applied to courts-martial of enlisted soldiers in times of peace.<sup>89</sup> These Executive Orders were incorporated in the various Manuals for Courts-Martial.<sup>90</sup> In 1908, the Manual reflected that the customs of the service could be used as a guide to imposing punishments in discretionary cases when no limitation had been set by the President.<sup>91</sup> In 1917 courts-martial were directed to use the limitations for a closely related offense if no punishments were prescribed.<sup>92</sup>

The types of punishments which are presently available to courts-martial include death; punitive discharge (or dismissal, in the case of officers); reduction in grade or, for officers of the Navy, Marine Corps, and Coast Guard, loss of numbers, lineal position or seniority; deprivations of liberty, which range from

<sup>84</sup>18 U.S.C. § 3551(b) (Supp. III 1985). See *supra* text accompanying notes 38-41.

<sup>85</sup>18 U.S.C. § 3551(a) (Supp. III 1985).

<sup>86</sup>Sentences prescribed for certain offenses under the Articles of War rendered the act of adjudging sentence simply ministerial: once conviction of such an offense occurred, the court-martial was without power to impose any sentence other than that prescribed in the Article. See W. Winthrop, *Military Law and Precedents* 395 (2d ed. 1920).

<sup>87</sup>Prior to amendment of the Articles of War to permit the President to set upper limits on punishments for specific offenses, *supra* note 81, any sentence permitted by the customs of the service could be imposed, subject only to the discretion of the court-martial.

<sup>88</sup>Act of Sep. 27, 1890, 26 Stat 491, ch. 998.

<sup>89</sup>See, e.g., Exec. Order No. 330B, June 12, 1905.

<sup>90</sup>See, e.g., Manual for Courts-Martial, Courts of Inquiry, and Retiring Boards, 1901 (Rev. ed.) at pp. 48-57; MCM, 1917, para. 349. The Executive Orders did not prescribe a maximum penalty for every offense under the Articles of War.

<sup>91</sup>Manual for Courts-Martial, Courts of Inquiry, and Retiring Boards, 1908, para. 342 [hereinafter MCM, 1908].

<sup>92</sup>MCM, 1917, para. 349 (Art. VII, Sec. 2).

confinement to restrictions to specified limits; reprimands; and financial penalties (fines and forfeitures).<sup>93</sup> Probation is not an authorized punishment, but suspension of authorized punishments operates as a type of probation.<sup>94</sup> While parole is not specifically authorized in the UCMJ, Army Regulation 190-47 permits release of military prisoners on parole.<sup>95</sup> Military parolees are currently supervised by federal probation officers.<sup>96</sup> Restitution is not an authorized punishment, although it may be a term of an agreement to plead guilty.<sup>97</sup>

Another major difference between the federal and the military systems is the role of the convening authority in sentencing. The sentence adjudged by a court-martial is merely an upper limit on the sentence which is ultimately imposed.<sup>98</sup> The convening authority has the absolute discretion to "approve, disapprove, commute, or suspend the sentence in whole or in part."<sup>99</sup> The sentence does not go into effect until the convening authority takes action. An accused normally begins serving a sentence to confinement

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<sup>93</sup>R.C.M. 1003.

<sup>94</sup>UCMJ art. 71(d). Article 72 provides for vacation of suspended punishments. Revocation of probation in the federal system is governed by 18 U.S.C. § 3565 (Supp. III 1985). An analogous procedure is used to vacate suspended sentences in the military. See UCMJ art. 72. The Court of Military Appeals has applied Supreme Court precedents in probation revocation proceedings to suspension vacation proceedings under this article. *United States v. Hurd*, 7 M.J. 18 (C.M.A. 1979).

<sup>95</sup>Dept. of Army, Reg. No. 190-47, *The United States Army Correctional System* (1 Oct. 1978) (hereinafter AR 190-47). Parole is not, strictly speaking, a punishment in the sense that an individual cannot be sentenced to parole under either system. It is a mitigation of the adjudged punishment to confinement.

<sup>96</sup>AR 190-47 (C1, Nov. 1980), para. 12-22. The Sentencing Reform Act § 218, Pub. L. No. 98-473, 98 Stat. 2027 (1984) repeals 18 U.S.C. Chapter 311, Parole. Section 235, 18 U.S.C. § 3551 note (Supp. III 1985), provides that individuals on parole after a five year phase-out period will be transferred to the supervision of the U.S. district courts. Under the Sentencing Reform Act, the demise of the federal Parole Commission and the shifting of the responsibility for supervising federal parolees to the federal courts may have far-reaching consequences for the parole system at the United States Disciplinary Barracks. The federal courts may not be willing to assume the responsibility for supervision of military parolees. Without parole as a release valve for the United States Disciplinary Barracks, which is already operating at or near capacity, sentences of prisoners may either be commuted to make room for new prisoners, or some sort of military post-release supervision program may be instituted.

<sup>97</sup>R.C.M. 705(c)(2)(C). MCM, 1984 contains the first uniform rules on pretrial agreements for the armed forces. Prior rules were formulated either by service regulation or were judicially imposed. Restitution provisions in pretrial agreements were accepted by the appellate courts prior to adoption of this provision. *United States v. Callahan*, 8 M.J. 804 (N.C.M.R. 1980); *United States v. Brown*, 4 M.J. 654 (A.C.M.R. 1977).

<sup>98</sup>*Cf. United States v. Occhi*, 2 M.J. 60, 62 (C.M.A. 1976) (convening authority enters a conviction, not the court-martial).

<sup>99</sup>UCMJ art. 60(c).

immediately,<sup>100</sup> absent a request for deferment, but other punishments do not become effective until the convening authority orders them executed,<sup>101</sup> or, in the case of punitive discharges, completion of appellate review.<sup>102</sup> There is no analogy in the federal system to this practice. The convening authority must decide if the need for a particular accused within the command outweighs the necessity to punish a wrongdoer. Balancing military necessity and the goals of punishment in individual cases is no easy task, and one that can only be done by the commander with both the responsibility for mission accomplishment and the authority to grant clemency as he sees fit.<sup>103</sup>

The differences in sentencing options between the two systems are unlikely to be eliminated. While the effectiveness of a punitive discharge as a criminal sanction has been questioned,<sup>104</sup> its effectiveness in terms of denunciation and general deterrence cannot be empirically measured. Proposals to eliminate discharges as criminal sanctions are unlikely to garner widespread support, in view of their long tradition as a military punishment.

The reduction sanction also serves a useful purpose. In a stratified society such as the military, punitively changing the level of an accused, particularly from noncommissioned officer to common soldier certainly has utility. While such actions can be accomplished administratively,<sup>105</sup> administrative reductions do not carry the same stigma as one imposed by court-martial. Reduction is one of the milder sentences which can be imposed by

<sup>100</sup>UCMJ art. 57(c); R.C.M. 1101(b).

<sup>101</sup>UCMJ art. 57.

<sup>102</sup>UCMJ art. 71.

<sup>103</sup>Much of the debate on the issue of giving military judges the power to suspend sentences focused on the impact that returning a convicted soldier under a suspended sentence to the command might have on discipline. "The decision to suspend a discharge must take into account the needs of the service as well as the interests of the individual." 1 Adv. Comm. Rep., *supra* note 15, at 6. The reasons for the Commission's decision that military judges should not be granted this power were best summed up by Major General Robert C. Oaks:

Military judges are not in a position to assess the effect on discipline, morale and good order that retaining a convicted military member would have on the command. Only a commander can determine this . . . the military judge does not exercise supervisory control over the member serving a suspended sentence. . . . This is the responsibility of the commander.

*Id.* at 230.

<sup>104</sup>Lance, *A Criminal Punitive Discharge—An Effective Punishment?*, 79 Mil. L. Rev. 1 (1978).

<sup>105</sup>Administrative reductions of enlisted members of the Army may be made for either misconduct or inefficiency. Dep't of Army, Reg. No. 600-200, Enlisted Personnel Management System, ch. 6 (15 Jan. 1986).

court-martial; if reductions were eliminated, other methods of achieving the same result, such as confinement or discharge might well be imposed.<sup>106</sup> Reductions stop short of a judgment that the accused has no further value to the military, but recognize that the accused should not be permitted to function at the same level of responsibility without again proving his or her worth. This sanction, when adjudged without a punitive discharge, reflects a commitment to rehabilitation as a philosophy of punishment—the concept that rank can be earned anew, and that status can be regained. While current reenlistment standards suggest that one who has received a court-martial conviction is not favored for retention,<sup>107</sup> reenlistment standards have frequently changed. Absent any strong reason for eliminating the reduction sanction, other than a desire to conform military sentences to the federal model, we should not tamper with a system that works. Given the fact that military sanctions cannot mirror those available in the federal civilian system, there is a cogent reason for differences in both sentencing philosophy and sentencing procedures. Courts-martial impose sentences for a different purpose. There may well be a stronger justification for evidence relating to an accused's rehabilitative potential in a court-martial, for the sentencing agency must decide whether to retain the individual in the military, and if so, at what rank or grade. Curiously enough, however, the federal sentencing procedure supplies more information to the sentencing judge about a defendant's rehabilitative potential than does the military system, even though rehabilitation will no longer be of central concern to the nature of the federal sentence imposed.<sup>108</sup> An examination of how the current

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<sup>106</sup>At inferior courts-martial, where punitive discharges are not authorized, the sentences which may be imposed are limited to forfeitures, fines, confinement (or lesser forms of restraints on liberty), and reduction. R.C.M. 1003. If reduction is unavailable as a separate punishment, the sentence may be more likely to include a short period of confinement as a means of achieving a reduction.

<sup>107</sup>Most soldiers confined as the result of a court-martial conviction who did not also receive a punitive discharge are administratively separated at the end of their sentence. In the Army in 1985, about 2% of the soldiers receiving sentences from four months to two years were returned to duty. Telephone interview with Captain Roland D. Meisner, Judge Advocate General's Corps, United States Army Correctional Activity, Fort Riley, Kansas (20 Mar. 1986). This number can be expected to rise as the number of available recruits in the general population continues to decline. Dep't of Army, Reg. No. 601-280, Army Reenlistment Program, para. 2-19g (20 July 1984), requires a waiver from the Commanding General of the Military Personnel Center before a soldier with any court-martial conviction may be permitted to reenlist.

<sup>108</sup>The information contained in a 201 file may, in some instances, be more useful than the plethora of data about an individual in a presentence investigative report, but it is hardly more complete. Compare 18 U.S.C. § 3663 (1982) ("No limitation shall be placed on the information concerning the background, character,



military sentencing procedures and philosophies have evolved will be useful in evaluating where they should go in the future.

## IV. SENTENCING IN COURTS-MARTIAL

### A. INTRODUCTION

The presentencing hearing currently used in courts-martial is a recent phenomenon. Prior to 1951, there was no separate sentencing hearing.<sup>109</sup> The development of this hearing has its roots in the 1886 ruling of the Secretary of War that permitted a court-martial to consider evidence of previous convictions of an accused<sup>110</sup> prior to adjudging sentence, and in the hearings authorized in guilty plea cases.<sup>111</sup> An examination of these sentencing practices provides insight into the restraints currently imposed on the receipt of sentencing evidence.

### B. SENTENCING FOR RETRIBUTION: WWI AND PRIOR

In his Civil War treatise on military law, Stephen Vincent Benet described the sentencing procedure in courts-martial in these terms: "Having in their finding, declared the innocence or guilt of the prisoner, the court then pronounce his acquittal, or proceed to award punishment according to the nature and degree of the offense."<sup>112</sup> Clearly, there was no separate procedure for presenting evidence on an appropriate punishment. The evidence presented on the merits about the offense sufficed:

Basing then the sentence upon the facts as established by the evidence and ascertained by the finding, the punishment will regularly and properly be measured by the peculiar circumstances preceding and accompanying it, the intent manifested by the offender, his animus toward

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and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.") with the restrictions placed on the admissibility of evidence in the presentencing hearing in a court-martial contained in R.C.M. 1001. See also Presentence Inves. Rep., *supra* note 16 (includes sample reports and detailed guidance for preparing presentence reports) and National Probation and Parole Association, Guides for Sentencing (1957) (an older guide for preparing the presentence report). Much of the information contained in the presentence report is simply inadmissible under the present military rules, based on its hearsay nature.

<sup>109</sup>Manual for Courts-Martial, United States, 1951 para. 75 [hereinafter MCM, 1951] established the presentencing hearing as an integral part of the courts-martial procedure.

<sup>110</sup>Gen. Orders. No. 41, HQ of the Army (26 June 1886).

<sup>111</sup>Discussed *infra* text accompanying notes 117-119.

<sup>112</sup>S. Benet, *supra* note 4, at 137.

the aggrieved person if any, the consequences of his act, its effect upon military discipline, and etc.<sup>113</sup>

This procedure reflects an emphasis on sentencing the offender for the offense, not for any individual characteristics he might possess—a retribution philosophy of punishment. Mitigating circumstances, however, might be considered by the members<sup>114</sup> in making clemency recommendations,<sup>115</sup> although they were not proper considerations for sentencing in general.<sup>116</sup>

In guilty plea cases, however, a sentencing hearing of sorts was authorized.<sup>117</sup> The purpose of such hearings was to provide the members and the reviewing authority with sufficient evidence to determine an adequate punishment:

In all cases of discretionary punishment... full knowledge of the circumstances attending the offense is essential to an enlightened exercise of the discretion of the court in measuring punishment, and for the information of the reviewing authority in judging the merits of the sentence. It is, therefore, proper for the court to take evidence after a plea of guilty in any such case, except when the specification is so descriptive as to disclose all

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<sup>113</sup>W. Winthrop, *supra* note 86, at 397.

<sup>114</sup>Sentencing was solely the province of the members until 1969, when sentencing by judge alone was introduced as an option of the accused. UCMJ art. 16, amended by The Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1355 (1968); MCM, 1969, para. 39b(5).

<sup>115</sup>W. Winthrop, *supra* note 86, at 397:

Should one or more members see fit to recommend the prisoner to mercy, because mitigating circumstances have appeared during the trial which could not be taken in determining the degree of guilt or the extent of punishment, their recommendation will not be embraced in the body of the sentence.

<sup>116</sup>*Id.* at 396 (emphasis original):

Thus, proof of valuable service, general good character, or other extraneous circumstances favorable to the accused but foreign to the merits of the case... cannot—strictly—be allowed to affect the discretion of the court in imposing sentence.... In practice, however, the fact that the accused is shown to have had a good character or record in the service prior to his offense is in general permitted to enter into the question of the punishment to be imposed.... Regularly, however, the same is rather ground for mitigation of punishment by the reviewing authority than for a milder judgment on the part of the court.

<sup>117</sup>*Id.* at 278-280. In discussing the history of such hearings, Colonel Winthrop indicated they were originally authorized in 1829, but only in capital cases and those involving desertion. The practice fell into disfavor after 1857, but was revived during the Civil War.

the circumstances of mitigation or aggravation that accompany the offense.<sup>118</sup>

Such hearings were governed by much the same rules as a trial on the merits: "When the court takes evidence after a plea of 'Guilty,' the accused may cross-examine the witnesses, produce evidence to rebut their testimony, offer evidence as to character, and address the court in extenuation of the offense or in mitigation of punishment."<sup>119</sup> This sentencing procedure has many of the same elements (confrontation, cross-examination, compulsory process, evidence of the character of the accused, and argument to the court) as the sentencing procedure currently used in courts-martial, regardless of the plea. It provides some explanation as to why the military justice system adopted an adversarial approach to sentencing evidence.

Aside from the evidentiary hearing authorized in guilty plea cases, the only particularized sentencing evidence<sup>120</sup> available to courts-martial was evidence of previous convictions. The purpose of receiving such evidence was "to ascertain, by an inquiry into

<sup>118</sup>Ray, Instructions for Courts-Martial and Judge Advocates 24 (1890) (citing Winthrop's Digest, p. 376).

<sup>119</sup>*Id.*

<sup>120</sup>Evidence presented on the merits was certainly used during sentencing. The accused was permitted to introduce evidence of good character, not only in defense, but in mitigation as well:

At military law, evidence of character, which is always admissible, is comparatively seldom offered strictly or exclusively *in defence*; but, when introduced, is usually intended partly or principally, as *in mitigation of the punishment* which may follow upon conviction. . . . It need have no reference to the nature of the charge, but may exhibit the reputation or record of the accused in the service, for efficiency, fidelity, subordination, temperance, courage, or any of the traits or habits that go to make the good officer or soldier. It also need not be limited to *general* character, but may include particular acts of good conduct, bravery, & c. It may also be either oral or written; consisting, if the latter, of testimonials from superior officers, recommendations for promotion, honorable mention in orders, awards of medals of honor, certificates of merit, warrants as non-commissioned officers, honorable discharges, & c., of which the originals or copies should be appended to the record of trial. Such evidence, in the event of conviction, may avail to lessen the measure of punishment if the same be discretionary with the court; if mandatory it may form the basis of a recommendation by the members and a mitigation or pardon by the reviewing officer. . . . Rebutting evidence of bad character, in military cases, may be of similar form and nature to the evidence introduced of good character.

W. Winthrop, *supra* note 86, at 351-352 (emphasis original). When the separate sentencing hearing was authorized in 1951, both the form of presentation and content of such evidence were preserved in that hearing. See *infra* text accompanying notes 161-176.

his previous record, whether the accused was an old offender, with a view if he were found to be such, of increasing the measure of his punishment and especially of inducing in his case a sentence of dishonorable discharge from the service."<sup>121</sup> The procedure for introducing such evidence was the precursor of the current bifurcated trial: After a finding of guilty, the court would open to ascertain if evidence of previous convictions had been referred to the court, and if so, to receive it before retiring to deliberate on sentence.<sup>122</sup> The evidence of previous convictions was severely restricted: only court-martial convictions were admissible; those of civil courts were not.<sup>123</sup> Formal proof of the conviction, either by the records of previous trials or by authenticated copies of the court-martial orders, was required.<sup>124</sup> Only "final" convictions were admissible.<sup>125</sup> Although Colonel Winthrop indicated that the evidence of previous convictions "need not be specifically referred to the court by the convening commander: it is sufficient if they come to the hands of the judge advocate with the charges, or are obtained by him from the proper official,"<sup>126</sup> later Manuals required that the court consider only those previous convictions which were referred to it with the charges.<sup>127</sup> Prior convictions could be used to expand the punishment limitations in effect for specific offenses,<sup>128</sup> as well as for general sentence enhancement. The convening authority could thus limit the aggravating evidence the court could receive.

Neither Winthrop nor Davis indicate why such restrictions were placed on the receipt of prior convictions. Certainly the drafters of the Army regulations which authorized consideration of these convictions could have specified less formal modes of proof. The fact they did not reflects an uneasiness with consideration of prior

<sup>121</sup>W. Winthrop, *supra* note 86, at 387. This language was extensively quoted in the various Manuals for Courts-Martial. See, e.g., MCM, 1917, para. 307.

<sup>122</sup>G. Davis, *The Military Laws of the United States*, 147 (1st ed. 1898).

<sup>123</sup>*Id.* See also Ray, *supra* note 118, at 37.

<sup>124</sup>W. Winthrop, *supra* note 86, at 387-388: "Copies of records introduced in evidence may of course be contested by the accused, as to the genuineness or correctness of the record, but should not be rejected for immaterial and presumably clerical errors in the copy." See also G. Davis, *supra* note 122 at 147-148: "It is unauthorized for the judge advocate to introduce, or the court to admit, as evidence of previous convictions (or in connection with proper evidence of the same), the statement of service, etc., required by para. 927, A.R. of 1895, to be furnished to the convening authority with the charges."

<sup>125</sup>G. Davis, *supra* note 122, at 148: "[T]he term 'previous conviction' means a conviction to which effect has been given by the approval of the sentence by competent authority."

<sup>126</sup>W. Winthrop, *supra* note 122, at 388.

<sup>127</sup>See e.g., MCM, 1917, para. 306; MCM, 1908, at 48.

<sup>128</sup>W. Winthrop, *supra* note 86, at 387.

convictions in sentencing. Colonel Winthrop detailed four common objections to consideration of prior convictions:

1. Such evidence would prejudice the court against the accused;

2. Since the court had to open to ascertain the existence of prior convictions after arriving at a finding of guilty, this procedure "disclosed the votes or opinions of members," in contravention of Article of War 84;

3. The procedure violated the rules of evidence by permitting introduction of bad character evidence without regard to whether the accused had placed his character in issue; and

4. Receipt of such evidence by the court invaded the province of the reviewing officer.<sup>129</sup>

In Winthrop's opinion, the rules governing the introduction of previous convictions were artificial and confusing.<sup>130</sup> He also expressed the belief that consideration of such convictions should be limited to the reviewing authority.<sup>131</sup>

Receiving evidence of prior convictions was a break with tradition, which accounted for the many restrictions on their use. Employing formal rules of evidence for their consideration could be expected to mollify those who felt that entertaining such evidence was improper. It was clearly the philosophy of the time that individuals should be sentenced for what they had done and not for what they were. The countervailing consideration was that the small time offender, whose individual crimes perhaps did not warrant a dishonorable discharge, was an appropriate candidate for such a discharge when his crimes were considered in the aggregate.

The restrictions on use of prior convictions were subsequently increased. The Manual for Courts-Martial, 1905 included a time constraint: only those convictions which occurred within one year of the commission of the current offense and within the current enlistment could be considered by the court.<sup>132</sup> The one year and current enlistment rule was retained in subsequent Manuals;<sup>133</sup>

<sup>129</sup>*Id.* at 389.

<sup>130</sup>*Id.*

<sup>131</sup>*Id.*

<sup>132</sup>Earlier rules had imposed timeliness constraints only to the extent that the previous convictions were used to increase the limit of maximum punishment. See, e.g., Gen. Orders No. 16, HQ of the Army (25 Mar. 1895).

<sup>133</sup>MCM, 1907, pp. 46-47; Manual for Courts-Martial, 1908, p. 47 [hereinafter MCM, 1908]; and MCM 1917, para. 306.

the 1917 Manual barred consideration of naval court convictions.<sup>134</sup>

By 1917, sentencing philosophy in the military appeared to be undergoing a shift away from retribution as the primary basis for imposing punishment.<sup>135</sup> The 1917 Manual contained information about the rehabilitative program at the United States Disciplinary Barracks, and discussed a new policy which permitted the suspension of a dishonorable discharge imposed for purely military offenses in order to return to duty those successfully rehabilitated.<sup>136</sup> It also provided the first guidance to members in how and why to sentence:<sup>137</sup>

In cases where the punishment is discretionary the best interest of the service and of society demand thoughtful application of the following principles: That because of the effect of confinement upon the soldier's self-respect, confinement is not to be ordered when the interests of the service permit it to be avoided; that a man against whom there is no evidence of previous convictions for the same or similar offenses should be punished less severely than one who has offended repeatedly; the presence or absence of extenuating or aggravating circumstances should be taken into consideration in determining the measure of punishment in any case; that the maximum limits of punishment authorized are to be applied only in cases in which from the nature and circumstances of the offense and the general conduct of the offender, severe punishment appears to be necessary to meet the ends of discipline; and that in adjudging punishment the court should take into consideration the individual characteristics of the accused, with a view to determining the nature of the punishment best suited to produce the desired results in the case in question, as the individual factor in

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<sup>134</sup>MCM, 1917, para. 307.

<sup>135</sup>Certainly sentences were influenced by factors other than retribution prior to this time. See, e.g., G. Davis, *supra* note 122, at 157: "The considerations which have influenced courts in this direction [that of light sentences] have in general been derived from the youth, inexperience or good character of the prisoner. . . ." The shift in emphasis at this time, however, came not from the consideration by individual members of the nature and circumstances of the accused as well as the offense, but rather from official pronouncements.

<sup>136</sup>MCM, 1917, para. 340.

<sup>137</sup>Until 1957, the members of a court-martial were permitted to consult the Manual for Courts-Martial during their deliberations on findings and sentence. This procedure was changed by judicial fiat in *United States v. Rinehart*, 8 C.M.A. 402, 24 C.M.R. 212 (1957).



one case may be such that punishment of one kind would serve the ends of discipline, while in another case punishment of a different kind would be required.<sup>138</sup>

Individualizing punishment—tailoring the punishment to fit the offender as well as the offense—was the clear purpose of these principles of sentencing. Ironically, the members were expected to apply these principles in a vacuum; there was no formal system for providing information about the individual. While the defense could provide some extenuating and mitigating information during the findings phase of the trial, the trial judge advocate had little opportunity to present contrary information about the accused, although he could present information about the aggravated nature of the offense.

Sentencing for rehabilitation was originally confined to those charged with desertion.<sup>139</sup> In the case of voluntary surrender, the War Department suggested confinement and forfeitures were an appropriate punishment.<sup>140</sup> Evidence of any prior convictions for desertion was admissible upon conviction of desertion, as an exception to the one-year and current enlistment rules on the admission of prior convictions.<sup>141</sup> Desertion had always been viewed as an extremely serious crime, one that struck at the heart of military discipline. Harsh sentences, even in time of peace, were common.<sup>142</sup> Mitigation of such harsh punishments through consideration of the individual's background, as well as the circumstances surrounding the offense, was appealing. Successful rehabilitation of deserters provided a basis to expand the concepts of rehabilitation and individualized punishment to other offenders.

There was apparently some general concern over the harsh nature of punishments handed out by military courts.<sup>143</sup> The principles of sentencing in the 1917 Manual can be viewed as a

<sup>138</sup>MCM, 1917, para. 342.

<sup>139</sup>MCM 1907, para. 340 indicated that the United States Disciplinary Barracks had some success with returning certain classes of deserters to duty.

<sup>140</sup>Gen. Order No. 77, War Dep't (10 Jun. 1911).

<sup>141</sup>Gen. Order. No. 204, War Dep't (15 Dec. 1908).

<sup>142</sup>Winthrop indicated that the usual peacetime sentence for desertion was a dishonorable discharge, total forfeitures, and confinement from one to five years. In wartime, death was common, particularly for bounty-jumpers (those who joined only for the enlistment bonus and then disappeared) and desertion to the enemy. W. Winthrop, *supra* note 86, at 644-645.

<sup>143</sup>Exec. Order No. 980, 25 Nov. 1908, provided: "This order prescribes the maximum limit of punishment for the offenses named, and this limit is intended for those cases in which the severest punishment should be awarded. In other cases the punishment should be graded down according to the extenuating circumstances." (emphasis original).

means of guiding the discretion of the members in order to mitigate such harsh punishments. An individualized approach to sentencing could reduce punishments in appropriate cases at the court-martial level for deserving offenders, eliminating the need for extensive clemency action by the reviewing officer. If some of those convicted of serious crimes, like desertion, could be successfully restored to duty, then the same might be done for other offenders. The real problem, however, in implementing these sentencing guidelines was how to determine what sentence the individual offender needed.

### ***C. 1921-1949: THE SLOW GROWTH OF THE SENTENCING HEARING***

Prescribed sentencing practices in the military did not undergo any major revisions from 1921-1950. Growth did take place in two areas, however: a small expansion in the sentencing evidence available to the members, and modifications to the methods of proving prior convictions.

The practice of opening the court after findings to consider evidence of prior convictions continued. While the one-year and current enlistment rule remained in effect for prior convictions of soldiers, the rule was expanded to permit evidence of convictions in the three years preceding the commission of any offense by an officer.<sup>144</sup> Although the 1920 Executive Order establishing admissibility of prior convictions required that proof of such convictions be made "only by the records of the trials in which they were had...or by duly authenticated copies of orders promulgating such convictions",<sup>145</sup> a provision of the 1921 Manual suggested that the entry of a previous conviction in the accused's service record could be used to prove a prior conviction.<sup>146</sup> The defense could object to the admission of the service record to prove prior convictions, based either on the correctness of the record or the nature of the conviction.<sup>147</sup> Objections not asserted were considered waived, except when it was apparent that the conviction was

<sup>144</sup>MCM, 1928, para. 79c; Manual for Courts-Martial, 1921, para. 306 [hereinafter MCM 1921].

<sup>145</sup>Exec. Order No. 3367, 10 Dec. 1920, Sec. V.

<sup>146</sup>MCM, 1921, para. 306. The 1928 MCM, para. 79c contained a similar provision. The Executive Order establishing maximum sentences contained in the 1928 MCM did not, however, specify the mode of proof for prior convictions. Para. 68 of that Manual required proof of prior convictions by the record of trial or the orders, applying the rules governing admissibility of documentary evidence used in trials on the merits.

<sup>147</sup>MCM, 1921, para. 306. The 1928 MCM, para. 79c, permitted objection by the defense on unspecified "proper grounds."

stale.<sup>148</sup> This procedure for proving prior convictions was adopted in two trial guides designed to supplement the Manuals,<sup>149</sup> indicating its widespread adoption.

Using an extract of the accused's service record to prove prior convictions was certainly simpler than obtaining authenticated copies of either records of trial or promulgating orders, and can hardly be said to be unfair to the accused. The opportunity to object to inaccurate or misleading evidence of such convictions protected the accused's rights, and the waiver rule placed the burden of objecting on the party with firsthand knowledge of the accuracy of such information. Further, the requirement for a timely objection permitted the court to consider alternative forms of such evidence if the service record was truly inaccurate or misleading.

This departure from formal evidentiary requirements in the abbreviated presentencing procedure was also followed in the presentation of the statement of service. The 1921 Manual permitted the court, after findings, to review the statement of service appearing on the first page of the charge sheet.<sup>150</sup> This statement included data on the accused's current enlistment, age, pay rate, allotments, prior service, and character of any prior discharges.<sup>151</sup> The first page of the charge sheet also included data on restraint; whether such data was ordinarily furnished to the members is uncertain. While the 1921 Manual indicated that the members were permitted to view the charge sheet, the 1921 practice guide reflected that the trial judge advocate read the data to them.<sup>152</sup> The 1943 practice guide directed the trial judge advocate to read to the members everything on page one of the charge sheet except data as to witnesses. This included data as to restraint.<sup>153</sup>

The 1921 Manual did not provide any detailed guidance to the members on how to exercise their sentencing discretion. The 1928 version, however, directed the members to consider "the character

<sup>148</sup>MCM, 1921, para. 306.

<sup>149</sup>McComsey, Outline of Procedure for Trials Before Courts-Martial, The Infantry School 15 (Rev. ed. 1943); U.S. Infantry Association, Courts-Martial Procedure 114 (1921) [hereinafter Courts-Martial Procedure]. Both guides indicate that the accepted practice was for the trial judge advocate to read the previous convictions from the accused's service record, and to ask the accused if there were any objections to the data as read. The 1943 guide required that the extract of the service record be marked as an exhibit and forwarded with the record.

<sup>150</sup>MCM, 1928, para. 271.

<sup>151</sup>MCM, 1921, Appendix 5.

<sup>152</sup>Courts-Martial Procedure, *supra* note 149, at 114-115.

<sup>153</sup>McComsey, *supra* note 149, at 15.

of the accused as given on former discharges, the number and character of the previous convictions, the circumstances extenuating or aggravating the offense itself, or any collateral feature thereof. . . ."<sup>154</sup> The Manual also reflected a concern that light sentences in cases triable by civil courts would adversely affect public opinion about the Army.<sup>155</sup> These provisions merely directed the court to consider the evidence available, and did not constitute a coherent rationale for sentencing. While the new procedures rendered slightly more information about an accused available (without any marked increase in trial complexity), sentencing decisions were still primarily based on the offense rather than the offender.

The nonadversarial approach to sentencing was about to change, however. Under the 1949 Manual for Courts-Martial, the sentencing process was modified in two important respects: first, sentencing evidence available to the accused was expanded, with a limited government right of rebuttal. Second, some guidance on why and how to sentence was provided for the consideration of the court.

Although previous Manuals had permitted the defense to introduce evidence of prior discharges as an extenuating factor,<sup>156</sup> the 1949 Manual allowed the prosecution to rebut such evidence, but only with other discharges.<sup>157</sup> This rule undoubtedly had the admirable purpose of preventing the defense from presenting a one-sided picture of the accused's prior service; unfortunately, this reasoning was not carried forward to explicitly permit the government to rebut other defense evidence permitted by the Manual, such as affidavits about the accused's character or evidence offered in extenuation of the offense.<sup>158</sup> Perhaps the drafters feared the consequences—an expanded presentence procedure—outweighed the benefits. That justification may have been a precursor of the pro-defense bias which permeated later sentencing procedures.

While sentencing guidance was provided, it was minimal. The members were enjoined to adjudge a sentence that was "legal, appropriate, and adequate. . . ."<sup>159</sup> In addition to considering the evidence presented at the presentencing hearing, they were

<sup>154</sup>MCM, 1928, para. 80.

<sup>155</sup>*Id.*

<sup>156</sup>*See, e.g.*, MCM, 1921, para. 270.

<sup>157</sup>MCM, 1949, para. 79d.

<sup>158</sup>*Id.* at para. 132b.

<sup>159</sup>*Id.* at para. 80a.

instructed to consider the need to render uniform sentences for similar offenses throughout the Army, although they were provided with no mechanism to determine what sentence ranges were normal for particular offenses.<sup>160</sup> Local conditions might dictate sentences more severe than the norm, an acknowledgement that the general deterrence value of sentencing was a proper consideration for the court.

The 1949 Manual countenanced at least four goals for sentencing: consideration of the background of the offender (rehabilitation and individual deterrence), uniformity in sentencing (retribution and just deserts), consideration of local needs and conditions (general deterrence), and the need to preserve respect for the military justice system (denunciation). Unfortunately, the court was given no guidance on how to weigh these factors, or how to resolve the obvious conflicts between uniformity in sentencing and individualization of the sentence. Like its predecessors, the 1949 Manual failed to provide the sentencing agency with the information necessary to implement any sentencing philosophy, other than retribution.

## ***D. SENTENCING PRACTICES UNDER THE UCMJ: 1951-1968***

### ***1. Introduction.***

The enactment of the Uniform Code of Military Justice and the promulgation of the 1951 Manual dramatically changed the character of the presentence hearing in courts-martial. The Manual established an adversarial sentencing hearing, thus altering the nature and scope of the sentencing process. In addition, the civilian judges of the newly created Court of Military Appeals interpreted and expanded the Manual's sentencing provisions to comport with their own notions of what the sentencing practice should be, often overruling the President in the process.

Under the new presentencing procedures, the prosecution and defense were permitted to "present appropriate matter to aid the court in determining the kind and amount of punishment to be imposed."<sup>161</sup> Whether the rules governing the admissibility of evidence at such proceedings permitted the sentencing agency sufficient information to determine an appropriate sentence was another issue.

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<sup>160</sup>*Id.* The nature and circumstances of each offense was still a proper matter for consideration.

<sup>161</sup>MCM, 1951, para. 75a.

The presentencing hearing consisted of both adversarial and nonadversarial procedures. After findings, the trial counsel presented the accused's service data,<sup>162</sup> and introduced evidence of previous convictions.<sup>163</sup> While the accused could object to this data, no hotly contested issues were likely to arise.<sup>164</sup> This relatively informal procedure, designed to provide the members with some background information about the accused, was simply a reiteration of past practices.

The major changes in the sentencing procedure involved the use of a hearing separate from the findings to consider evidence in aggravation, extenuation, and mitigation, as well as rebuttal evidence. After a plea of guilty had been accepted and the trial counsel finished reading the accused's service data and prior convictions to the court,<sup>165</sup> he could then introduce admissible evidence in aggravation of the offense,<sup>166</sup> subject to the defense's right to cross-examine and rebut.<sup>167</sup> This aggravation hearing was the successor to earlier rules permitting the government to introduce such evidence before findings in guilty plea cases.<sup>168</sup> Since the accused was permitted to confront and cross-examine witnesses and to rebut the government's case under the previous practice, it was logically consistent to afford the accused the same rights when the timing of the introduction of aggravation evidence was changed. There was certainly no requirement to do so, however.<sup>169</sup>

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<sup>162</sup>*Id.* at para. 75b(1). This information was limited to age, pay, current and prior service, and data as to restraint.

<sup>163</sup>*Id.* at para. 75b(2). Only convictions which occurred during the current enlistment and within three years of any offense of which the accused was convicted were admissible. This represents an expansion of the one-year rule of previous Manuals, discussed *supra* text accompanying notes 120-134.

<sup>164</sup>See Appendix 8, MCM 1951, at 520. This trial guide suggests that if the defense complains of error and the matter cannot be readily verified, the claimed error will be noted in the record. Additional evidence would be required only for matters of importance.

<sup>165</sup>Para 75c required the trial counsel to introduce "evidence" of prior convictions. The MCM, 1951 Trial Guide found in Appendix 8 apparently contemplated that, absent any defense objections, the trial counsel would merely read the data reflecting prior convictions, and would introduce admissible evidence only when the defense so required. This conflict was later resolved adversely to the government by the Court of Military Appeals. *United States v. Carter*, 1 C.M.A. 108, 2 C.M.R. 14 (1952), discussed *infra* notes 195-198 and accompanying text.

<sup>166</sup>MCM, 1951, para. 75c(3).

<sup>167</sup>*Id.* para. 75d.

<sup>168</sup>Discussed *supra* text accompanying notes 117-119.

<sup>169</sup>In 1948, the United States Supreme Court had ruled that the evidence considered by a court in sentencing must be factually correct. *Townsend v. Burke*, 348 U.S. 736 (1948). The next year, in *Williams v. New York*, 337 U.S. 241 (1949) the Court held that a sentencing procedure in which the defendant was not permitted confrontation and cross-examination rights, and in which hearsay was



The sentencing hearing then became the defense's show. The accused was permitted to make an unsworn statement, which was not "evidence."<sup>170</sup> Government rebuttal of such statements was limited to "statements of fact therein."<sup>171</sup> The defense could introduce a variety of information in extenuation and mitigation, to include specific acts of the accused as well as general good character evidence; the rules of evidence were relaxed to permit the consideration of affidavits, certificates, and other writings.<sup>172</sup> While the government could rebut such evidence, the rules of evidence were relaxed for the government only to permit introduction of discharge certificates.<sup>173</sup> Evidence offered on the findings could also be considered on sentencing.<sup>174</sup> The nature and extent of rebuttal evidence became a matter for considerable attention by the Court of Military Appeals.

Paragraph 76a purported to provide the members a basis for determining an appropriate sentence. The guidance included an admonishment to adjudge the maximum sentence only in aggravated cases or when there was evidence of prior convictions. Prior convictions for less serious offenses should not be used alone to justify the maximum sentence. The members were also directed to effect sentence uniformity by considering sentences adjudged in similar offenses, subject to local needs. They were, however, to use their own discretion in adjudging sentence and were not to rely on higher authority to mitigate a severe sentence. Other sentencing considerations included the effect that a light sentence for offenses triable in civil courts would have on the reputation of the armed forces, and guidance on when the two types of punitive discharge would be appropriate. While the court was directed to consider certain evidence showing the character of the accused,

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considered, was constitutionally valid. While *Williams* involved sentencing by a judge (after the jury recommended a sentence), the distinctions drawn in the case between the need for rules of evidence on findings and their lack of utility in sentencing would apply equally to members sentencing. *Id.* at 247. The military practice of members adjudging a sentence which can be modified, albeit only in the accused's favor, by the convening authority is analogous to the New York procedure used during the *Williams* trial. The sentencing judge in New York was permitted to impose a sentence in excess of that adjudged by the jury.

<sup>170</sup>MCM, 1951, para. 75a indicated that evidence introduced during sentencing could be used to sustain the findings. By so classifying the accused's unsworn statement, para. 75c ensured that it could not be used against him to perfect an otherwise deficient finding of guilty.

<sup>171</sup>*Id.*

<sup>172</sup>*Id.*

<sup>173</sup>*Id.* para. 75c(4).

<sup>174</sup>*See, e.g.* para. 123, which permitted consideration of the mental condition of the accused as a factor in adjudging sentence even when it was not sufficient to establish a sanity defense.

the mitigating evidence was *not* one of the factors listed for the court's consideration.<sup>175</sup>

The sentencing guidelines in the 1951 Manual were merely a reiteration of the guidelines used previously, particularly those of the 1949 Manual. The guidelines did not reflect the impact of expanded sentencing evidence, and in fact, de-emphasized the efforts of paragraph 75 to increase the individualization of punishment. The philosophical bases for punishment otherwise remained much the same: retribution, denunciation, and individual and general deterrence. The deficiencies in previous sentencing guidelines remained. There was no real effort to structure the court's discretion; no information or standards provided to accomplish the goal of sentence uniformity; and the guidelines did not mandate adequate consideration of the individual being sentenced. Perhaps the absence of a mandate to consider mitigating factors was deliberate—an effort to balance the defense slant<sup>176</sup> to the sentencing hearing by de-emphasizing it as a consideration during the sentence deliberations.

Creation of a real appellate court system for the armed forces probably resulted in more far-reaching consequences for the sentencing process than did the Manual changes. The Manual merely created a sentencing hearing; the Court of Military Appeals determined its nature and extent. The unique fact-finding powers of the Boards of Review, and their ability to reduce courts-martial sentences,<sup>177</sup> also had an impact, but one not nearly so great as that of the Court of Military Appeals. The Court of Military Appeals' treatment of prior convictions; aggravation, extenuation and mitigation testimony; rebuttal evidence; uncharged misconduct and its impact on the sentence; argument of counsel; post-trial reviews and action; and the philosophical basis for sentencing will all be discussed at greater length.

## 2. *The Philosophy of Sentencing.*

The tension between the issue of unlawful command influence<sup>178</sup>

<sup>175</sup>MCM 1951, para. 76a(2).

<sup>176</sup>To some extent, the relaxation of the rules of evidence for the defense during the sentencing hearing worked to the government's overall advantage. If affidavits were admissible, there would be a reduced need to produce defense witnesses, thus saving money. To the extent that live testimony would carry greater weight with the members, affidavits were an advantage to the prosecution. The economic argument can be turned around: it would also be more economical to permit the government to offer affidavits in rebuttal of defense affidavits, rather than requiring admissible evidence, i.e., witnesses.

<sup>177</sup>UCMJ art. 66(c).

<sup>178</sup>UCMJ art. 37.

and the need to provide guidance to the sentencing authority was a troublesome one for the military appellate courts. Guidance could easily be equated with influence. Determining what types of guidance could lawfully be given to the court members and by whom was a difficult task, one the Court of Military Appeals solved by a judicial mandate to individualize sentences. In *United States v. Mamaluy*<sup>179</sup> the court ruled that members could not receive instructions directing them to consider sentences in similar cases. The court held that such instructions would interfere with the military policy to individualize sentences, and rejected uniformity as a goal of sentencing. How the court determined that individualized sentencing should be the primary goal of military sentencing is uncertain. The 1951 Manual certainly did not so provide. While the boards of review had also questioned the utility of the uniformity provision<sup>180</sup> they had considered a variety of sentencing philosophies permissible.<sup>181</sup> The *Mamaluy* opinion was to some extent presaged by *United States v. Rinehart*.<sup>182</sup> In *Rinehart*, the Court of Military Appeals prohibited the long-standing military practice of the members consulting the Manual for Courts-Martial during their deliberations. This prevented the members from being "unlawfully" influenced in their deliberations by Manual provisions stating, e.g., that thieves should not ordinarily be retained<sup>183</sup> or that local needs and conditions (such as a rash of AWOL offenses) could be used to enhance the punishment in a particular case.<sup>184</sup>

<sup>179</sup>10 C.M.A. 102, 106, 27 C.M.R. 176, 180 (1959).

<sup>180</sup>*See, e.g., United States v. Dowling*, 18 C.M.R. 670 (A.F.B.R. 1954). The president of the court had requested information on sentences in comparable cases, which the law officer refused to provide. In upholding the law officer's decision, the Board opined that paragraph 76a simply permitted the court members to consider sentences that they had previously adjudged. *Id.* at 679.

<sup>181</sup>*See, e.g., United States v. Weller*, 18 C.M.R. 473 (A.F.B.R. 1954) (protection of society, discipline, general deterrence); *United States v. Jennings*, 17 C.M.R. 457 (N.B.R. 1954) (general deterrence and denunciation). In an earlier Court of Military Appeals opinion, *United States v. Barrow*, 9 C.M.A. 343, 26 C.M.R. 123 (1958), Judge Latimer had approved of a variety of reasons for punishing military offenders, in addition to individualization of sentences:

In civilian courts, a judge is primarily concerned with the protection of society, the discipline of the wrongdoer, the reformation and rehabilitation potential of the accused, and the deterrent effect on others who are apt to offend against society. Those are all essential matters to be considered by a convening authority but, in addition, he must consider the accused's value to the service if he is retained and the impact on discipline if he permits an incorrigible to remain in close association with other members of the armed services.

<sup>182</sup>8 C.M.A. 402, 24 C.M.R. 212 (1957).

<sup>183</sup>MCM, 1951, para. 33h. The assistant trial counsel had urged the members to consider this provision in *Rinehart*. *Id.* at 404-405, 214-215.

<sup>184</sup>MCM, 1951, para. 76c(4).

### 3. Aggravation Evidence.

An emphasis on individualized punishment is somewhat at odds with the admissibility of aggravation evidence. If the purpose of punishment is only to reform and rehabilitate the offender, then information about the offense and the victim is of little utility. In rehabilitation philosophy, the focus is on what sort of person the offender is and what treatment or punishment will correct his deficiencies. The nature of the offense committed and the harm done to the victim are only important insofar as they reflect the offender's nature. Yet the appellate courts continued to sanction the admissibility of evidence which aggravated the offense, but refused to consider aggravating evidence which merely related to the offender. In *United States v. Billingsley*,<sup>185</sup> a trial counsel, focusing on the nature of the offender, asked an "aggravation" witness if he would take the accused back to work for him. The Board held that this was not proper aggravation, and would only be admissible in rebuttal. Proper aggravation evidence included information about the status of the victim<sup>186</sup> and the termination of an absence by apprehension.<sup>187</sup> Although evidence of remission of a previously adjudged bad conduct discharge three days before commission of the current offense was not admissible,<sup>188</sup> evidence that the accused had refused nonjudicial punishment for one of the offenses at trial was.<sup>189</sup>

Consideration on sentencing of evidence of uncharged misconduct became a matter of some concern to the Court of Military Appeals. Its treatment of such evidence was somewhat anomalous, given the emphasis on individualization of sentences. Certainly evidence that the accused had committed other offenses had a bearing on what type of punishment was needed, but the court refused to permit its consideration at sentencing, even when properly admitted on the merits of the case.<sup>190</sup> Even when the defense was responsible for the introduction of uncharged misconduct evidence at the sentencing hearing, the law officer was required, *sua sponte*, to instruct that it could not be considered.<sup>191</sup>

<sup>185</sup>20 C.M.R. 917, 919 (A.F.B.R. 1955).

<sup>186</sup>*United States v. Baker*, 34 C.M.R. 833, 839 (A.F.B.R. 1964).

<sup>187</sup>*United States v. Lopez*, 38 C.M.R. 663 (A.B.R. 1968).

<sup>188</sup>*United States v. Allen*, 21 C.M.R. 609 (C.G.B.R. 1956).

<sup>189</sup>*United States v. Abbott*, 17 C.M.A. 405, 37 C.M.R. 405 (1967). The court did not specifically hold that the record of nonjudicial punishment was aggravation evidence, although that is how the trial counsel characterized the document.

<sup>190</sup>*United States v. Pendergrass*, 17 C.M.A. 391, 38 C.M.R. 189 (1967).

<sup>191</sup>*United States v. Averette*, 17 C.M.A. 319, 38 C.M.R. 117 (1967). The accused made a sworn statement in which he admitted a civilian conviction. No limiting instruction was requested or given. Chief Judge Quinn dissented, arguing that the

The instructions had to clearly prohibit the members' consideration of such evidence.<sup>192</sup>

#### 4. Prior Convictions.

Evidence of prior convictions could have a dramatic impact on the sentencing decision, either through a direct enhancement of the maximum punishment, or through more indirect means: revealing that the offender had not benefited from prior correction measures, or presented a more serious danger to society, and should therefore be sentenced more severely. Prior convictions have been used for both direct sentence enhancement<sup>193</sup> and for their impact on what sentence to impose, within the authorized range.<sup>194</sup> Recognizing the devastating impact prior convictions could have on an accused's sentence, the Court of Military Appeals formalized evidentiary rules regarding their admissibility. In *United States v. Carter*,<sup>195</sup> the court rejected the practice of the trial counsel merely announcing the prior convictions of the accused, and asking the defense if there was any objection to the data as read. The court followed the lead of the Army Board of Review in *United States v. Arizona*,<sup>196</sup> an opinion it cited with

testimony was sworn, properly admitted, and relevant to the issue of punishment, for it indicated the type of person the accused was—certainly a concern relevant to individualized punishment. *Id.* at 320, 38 C.M.R. at 118. See also *United States v. Baskin*, 17 C.M.A. 315, 318, 38 C.M.R. 113, 115 (1967). *Baskin* involved an unsworn statement. Citing the need to encourage a free flow of information from the accused in the presentence hearing, the court justified excluding evidence of uncharged misconduct on sentencing.

<sup>192</sup>In *United States v. Vogel*, 17 C.M.A. 198, 199, 37 C.M.R. 462, 463 (1967), the accused, convicted of possession and transfer of marijuana, testified that he had used marijuana as well. The law officer's instruction: "He is not charged with nor is he punished for, the use of marijuana. These matters have been presented to the court by the accused and they are facts and factors which the court can consider in determining what an appropriate sentence is for this accused" was held to be error. The defense had introduced evidence of the accused's marijuana usage as a mitigating factor, showing his dependence on the drug, and thus explaining the possession charge, at least.

<sup>193</sup>See, e.g., MCM, 1951, para. 127c, Table of Maximum Punishments, Section B. For example, two prior convictions would authorize the imposition of a bad conduct discharge, even if the maximum penalty for the offense of which the accused was convicted did not authorize one.

<sup>194</sup>See MCM, 1951, para. 76a(1).

<sup>195</sup>1 C.M.A. 108, 2 C.M.R. 14 (1952). Trial procedure guides since 1921 had suggested this practice. See *Courts-Martial Procedure*, *supra* note 149, at 114. Appendix 8, MCM, 1951, had followed this practice, but was vague about whether documentary evidence of the prior convictions had to be attached to the record in all cases, or only when the defense objected to the data as read. *Id.* at 520. In *Carter*, no evidence was introduced. 1 C.M.A. at 110, 2 C.M.R. at 16.

<sup>196</sup>1 C.M.R. 725 (A.B.R. 1951). The Board concluded that admissible evidence of prior convictions was required to invoke the sentence enhancement provisions of the Table of Maximum Punishments. Referring to the trial counsel's announcement as "unsworn hearsay," the Board relied on precedents regarding

approval.<sup>197</sup> The Court of Military Appeals favored a formal approach: "[I]t would appear to be more desirable to have the document marked as an exhibit, shown to the accused, its admissibility determined, and, if admitted in evidence, then permit the trial counsel to read it to the court."<sup>198</sup> When the evidence of prior convictions was marked as an exhibit and attached to the record, although never formally introduced, the court did not find reversible error, although it condemned the practice.<sup>199</sup> The desire for appellate scrutiny of evidence of prior convictions was the reason for the differing results: even if not introduced, the documents were available for review on appeal. Although evidence of prior convictions helped to individualize the sentence, the court was unwilling to treat such information, with its negative impact on the accused, in the same manner as the data as to service, which was normally mitigating or neutral, and was in any event, always attached to the record through the charge sheet.

Appellate defense counsel also attacked the "bare bones" nature of the evidence of prior convictions, arguing that the character of the offense, not merely the fact of conviction must be shown in order for the information to be useful in determining an adequate sentence.<sup>200</sup> While accepting the logic of the argument, Chief Judge Quinn was unwilling to engraft this requirement onto the Manual.<sup>201</sup>

##### 5. *Extenuation and Mitigation Evidence.*

The 1951 Manual authorized the introduction of a variety of evidence in extenuation and mitigation, and allowed considerable latitude in the means of presenting it.<sup>202</sup> Both the Court of Military Appeals and the boards of review were extremely reluctant to impose limitations on such evidence, although there were a few. The accused could not, after findings, deny an element

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admissibility of evidence at the findings phase of the trial.

<sup>197</sup>*Carter*, 1 C.M.A. at 113, 2 C.M.R. at 16.

<sup>198</sup>*Id.*

<sup>199</sup>*United States v. Walker*, 1 C.M.A. 580, 583, 5 C.M.R. 8, 11 (1952).

<sup>200</sup>*United States v. Clark*, 4 C.M.A. 650, 652, 16 C.M.R. 224, 226 (1954).

<sup>201</sup>*Id.*

<sup>202</sup>MCM, 1951, para. 75c. Evidence in extenuation "serves to explain the circumstances surrounding the commission of the offense, including the reasons that actuated the accused but not extending to a legal justification." Para. 75c(3). Matters in mitigation "include particular acts of good conduct or bravery. It may exhibit the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other traits that go to make a good officer or enlisted person." Para 75c(4).



of the offense,<sup>203</sup> nor could he offer evidence of the acquittal of his accomplice<sup>204</sup> or his eligibility for an administrative separation at the time of the offense.<sup>205</sup> While there is some basis for the rulings in the first two cases, since the evidence was either excluded by the Manual or unrelated to the accused himself,<sup>206</sup> the decision in *United States v. Lucas*,<sup>207</sup> on the accused's eligibility for administrative elimination, is more difficult to justify. Evidence of character and behavior disorders at the time of the offense would certainly be a mitigating factor, and one that should have some bearing on the sentence adjudged. Perhaps the Board and the law officer were second-guessing the defense counsel (who evidently felt the evidence was mitigating) and were concerned that evidence of eligibility for administrative separation would make the members more likely to adjudge a punitive discharge. This opinion was particularly surprising in view of an earlier Court of Military Appeals opinion, *United States v. Cook*.<sup>208</sup> In *Cook*, the law officer refused to instruct that the accused's mental condition, although not amounting to a defense of insanity, was a mitigating factor to be considered on sentencing. The court reversed. Perhaps the problem in *Lucas* was the method of presenting the evidence: eligibility under the regulations for an administrative separation was perilously close to interjecting Army policy into the members' deliberations, an action prohibited by the command influence decisions.<sup>209</sup>

Introduction of opinion evidence on sentencing ran into similar roadblocks, particularly when an opinion on the sentence to be adjudged was expressed:

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<sup>203</sup>*United States v. Tobita*, 3 C.M.A. 267, 12 C.M.R. 23 (1953). The accused denied the use of force in the charged rape. Since consent amounted to a valid defense, a literal reading of paragraph 75c(3) prohibited such testimony.

<sup>204</sup>*United States v. Raines*, 32 C.M.R. 550, 551-552 (A.B.R. 1962). While recognizing that the acquittal of the accomplice might influence those imposing sentence, the board concluded that, due to problems in litigating collateral issues, the law officer did not err in excluding the evidence.

<sup>205</sup>*United States v. Lucas*, 32 C.M.R. 619, 620 (A.B.R. 1962). The board called the evidence that the accused had character and behavior disorders which would qualify him for an administrative separation "incompetent, immaterial and irrelevant in mitigation."

<sup>206</sup>In *Raines*, the board of review was not, strictly speaking, concerned about sentence comparison, since the accomplice had been acquitted, but the problem of comparing one accused to another remained, and was not conducive to individualizing the sentence.

<sup>207</sup>32 C.M.R. 619 (A.B.R. 1962).

<sup>208</sup>11 C.M.A. 579, 581, 29 C.M.R. 395, 397 (1960).

<sup>209</sup>See, e.g., *United States v. Hawthorne*, 7 C.M.A. 293, 22 C.M.R. 83 (1956) (command policies which attempt to influence judicial process are illegal).

Such a recommendation as to the specific components of an appropriate sentence is not evidence in military courts-martial and when indiscriminately permitted to be used to influence the members of the court in determining a sentence under the guise of mitigation could constitute an interference with the duties of the court members.<sup>210</sup>

The Court of Military Appeals eventually finessed the issue: In *United States v. Robbins*,<sup>211</sup> the court ruled that the testimony of the accused's platoon sergeant that he would take the accused back to work for him should have been admitted. Since the evidence related to the accused's character, regardless of its opinion nature, it was admissible.<sup>212</sup>

Evidence from or about victims received conflicting treatment. Evidence that the victims of a larceny offense no longer desired to prosecute could be excluded.<sup>213</sup> That decision supported the individualized sentence rationale, but a board of review decision reducing an accused's sentence based on evidence that the victim of a rape offense had a history of prior unchaste conduct did not.<sup>214</sup> Evidently, the just deserts philosophy of sentencing was still accepted by military courts.

Pretrial agreements in guilty plea cases affected extenuation and mitigation testimony. It had early been determined that a provision of a pretrial agreement which waived an accused's right

<sup>210</sup>*United States v. Capito*, 31 C.M.R. 369, 370 (A.B.R. 1962). The defense introduced 13 statements of officers and noncommissioned officers attesting to the accused's good character. Before admitting them the law officer redacted phrases from 11 of them expressing an opinion or recommendation that the accused should not receive a punitive discharge. Opinion evidence was also an issue in *Lucas*, 32 C.M.R. at 620. The defense had called the Article 32 investigating officer and asked his recommendation on sentence. The Board upheld the law officer's exclusion of that testimony: "The determination of an appropriate sentence is a judicial function of a court-martial and opinion testimony as to an appropriate sentence is incompetent."

<sup>211</sup>16 C.M.A. 474, 478, 37 C.M.R. 94, 98, (1966).

<sup>212</sup>See also *United States v. Guy*, 17 C.M.A. 49, 37 C.M.R. 313 (1967). (error to exclude evidence that witnesses, who had served with the accused in combat, would be willing to so serve with him again); *United States v. Evans*, 36 C.M.R. 735, 736 (A.B.R. 1966) (testimony of a personnel warrant officer, who had been assisting the accused with some personal problems, that he would be willing to have the accused work for him was improperly excluded).

<sup>213</sup>*United States v. Ault*, 15 C.M.A. 540, 541, 36 C.M.R. 38, 39 (1965). The statement had been made in connection with a civil trial for the same offense.

<sup>214</sup>*United States v. Shields*, 40 C.M.R. 546 (A.B.R. 1969). The fact the accused chose a victim with a history of unchaste conduct has no bearing on an individualized sentence. Making her prior experiences relevant to a sentencing decision focuses the sentence on the harm to the victim rather than the conduct or background of the offender.

to present mitigation evidence violated military due process.<sup>215</sup> Nevertheless, the Court of Military Appeals became concerned that sub rosa agreements not to present extenuation and mitigation evidence in such cases were common, and expressed a willingness, when such evidence was available but not presented, to reverse for ineffective assistance of counsel.<sup>216</sup> The Court of Military Appeals evidently felt that extenuation and mitigation evidence was so essential to a fair sentence that it was willing to substitute its judgement for that of the defense counsel.<sup>217</sup> The negotiated sentence limitations were not sufficient reason to limit the members' consideration of extenuation and mitigation evidence.

### 6. *Rebuttal Evidence.*

The adversarial presentencing hearing established in the 1951 Manual included the government's right to cross-examine defense sentencing witnesses and to rebut the extenuation and mitigation evidence. The evidentiary constraints the prosecution faced were much more stringent than those imposed on the defense. The government could call witnesses and introduce documents to rebut the defense evidence, but was limited by the rules of evidence. The essentially different nature of this hearing<sup>218</sup> did,

<sup>215</sup>United States v. Callahan, 22 C.M.R. 443 (A.B.R. 1956).

<sup>216</sup>United States v. Allen, 8 C.M.A. 504, 508, 25 C.M.R. 8, 12 (1957). Some of the mitigation evidence available was presented to the convening authority in the post-trial review.

<sup>217</sup>The Court of Military Appeals conducted close scrutiny of guilty plea records which did not contain extenuation or mitigation evidence. See, e.g., United States v. Friberg, 8 C.M.A. 515, 516, 25 C.M.R. 19, 20, (1957) (distinguishing *Allen*, because the stipulation of fact was substantially less aggravating than the testimony of the witnesses at the pretrial investigation); United States v. Williams, 8 C.M.A. 552, 553, 25 C.M.R. 56, 57 (1957) (also distinguishing *Allen*). The stipulation of fact was somewhat mitigating, but the real key to the decision was the evidence which the court did not have an opportunity to consider: "[W]e can state with some degree of assurance that had defense counsel opened up the subject of extenuation and mitigation, the government could have countered with evidence which would have militated strongly against the accused . . . had the whole area . . . opened up, a more severe sentence would have been imposed." The court was clearly examining these records with great care. Interestingly, the *Williams* case reflects the quantity of evidence which was not going to the members, in spite of the Court of Military Appeals' emphasis on individualizing sentences.

<sup>218</sup>In an often-cited opinion, the Air Force Board of Review remarked:

At the outset, we recognize that a very bad man might have a righteous case, and it has been said that it is the duty of a court to try the case not the man. However, when the fact of guilt has been established by a fair and impartial hearing upon the offense charged, as here, the good or bad character of the accused, among other factors, is clearly relevant in determining the sentence to be imposed. At this stage of the proceedings the only matter for the determination

however, prompt the Court of Military Appeals to relax somewhat the rules of evidence:

It is not without significance that the Manual is replete with similar instances in which—after findings—certain rules of evidence are applied with diminished rigor in favor of both the accused and the government. . . . [M]anifestly, the leniency accorded both parties in the presentation of evidence *after verdict* was intended to permit the court-martial to take into consideration all information, which is relevant and reasonably reliable, as an aid in fixing sentence.<sup>219</sup>

Judge Brosman, however, promised more than he could deliver. Neither the Manual, the boards of review, nor the Court of Military Appeals were willing to countenance the same relaxation of the rules of evidence for the government as that accorded the defense.

The rules of evidence would not be so relaxed as to permit the introduction of hearsay documents or testimony.<sup>220</sup> The govern-

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of the court was a sentence which would provide a legal, appropriate and adequate punishment.

United States v. Flanagan, 7 C.M.R. 751, 753 (A.F.B.R. 1953), *petition denied*, 8 C.M.R. 178 (1953).

<sup>219</sup>United States v. Blau, 5 C.M.A. 232, 243, 17 C.M.R. 232, 243 (1954) (emphasis original).

<sup>220</sup>United States v. Anderson, 8 C.M.A. 603, 605, 25 C.M.R. 107, 109 (1958). After the accused had made an unsworn statement through counsel about his performance in the brig, his mother's concern that he receive a medical examination, and his declination of an opportunity to join in a break-out from the brig, the trial counsel responded with a comment that the accused had received a medical exam. The court held the unsworn testimony of the trial counsel was error. In dissent, Judge Latimer contended that the trial counsel should be permitted to answer or explain the accused's allegations. *See also* United States v. James, 34 C.M.R. 503, 504-505 (A.B.R. 1963) (error to permit the trial counsel to rebut the accused's unsworn testimony that his absence was due to his need to comply with a court order to support his wife with an affidavit from his wife that she had not received any money from the accused during the period of his absence); United States v. Pulley, 32 C.M.R. 533, 534 (A.B.R. 1962) (error to permit rebuttal of the accused's long service and desire to stop drinking with evidence of an administrative elimination recommendation from the accused's personnel file which demonstrated the accused had already been given an opportunity to control his drinking problem); United States v. Ellwein, 18 C.M.R. 500, 511-512 (A.F.B.R. 1954) (error to permit rebuttal of the accused's statement that he had never been in trouble in his previous assignment with the testimony of an OSI agent that his suspicions had focused on the accused as the result of an OSI report from the accused's previous duty station); United States v. Schriver, 16 C.M.R. 429, 430 (N.B.R. 1954) (error to permit the trial counsel to comment that the accused's self-inflicted wounds would entitle him to veterans medical care if a bad conduct discharge were not awarded); United States v. Graham, 2 C.M.R. 629, 630 (C.G.B.R. 1952) (error to permit the trial counsel to read a witness's statement into the record to rebut

ment was permitted, however, to rebut evidence of specific acts of good character with both evidence of general bad character and specific bad acts.<sup>221</sup> Rebuttal could even extend to evidence which was otherwise inadmissible.<sup>222</sup>

The board of review decision in *United States v. James*<sup>223</sup> highlights the disturbing nature of the double standard on the admissibility of sentencing evidence. The board, citing a number of reasons for the relaxation of evidentiary requirements for defense evidence<sup>224</sup>, was apparently willing to countenance the presentation of testimony which conveyed a false impression to the members rather than allow the government to rebut such evidence with affidavits:<sup>225</sup>

The net effect of the affidavit was to unequivocally counter the defense image of a soldier who went absent without leave to comply with a court decree to support his family. He was given no chance to confront the witnesses against him concerning the damaging aver-

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the accused's unsworn statement). But see *United States v. Duncan*, 22 C.M.R. 696, 697 (N.B.R. 1956) (not error to permit the trial counsel to read the remainder of a statement to the court after the defense counsel had read a portion of it). Although the board characterized its decision as a matter of "fairness" a better rationale was the long-standing evidentiary rule of completeness.

<sup>221</sup>*Blau*, 8 C.M.A. at 241, 17 C.M.R. at 241. See also *United States v. Brewer*, 39 C.M.R. 388, 390 (A.B.R. 1968) (after the defense introduced evidence that the accused was a good soldier, the trial counsel called the accused's commander who testified the accused was "worthless" and "a coward". After the law officer instructed the members to disregard the characterization as a coward, the commander was permitted to testify that the accused had refused to go on two combat patrols). But see *United States v. Paulson*, 30 C.M.R. 465, 467 (A.B.R.), petition denied, 30 C.M.R. 417 (1961) (evidence that the accused was an above average soldier and capable of rehabilitation could not be rebutted with the testimony of the assistant corrections officer from the post stockade that the accused had a poor record in pretrial confinement); and *United States v. Henry*, 6 C.M.R. 501, 503 (A.F.B.R. 1952) (statements that the accused was supporting a wife and child could not be rebutted with evidence of the accused's problems in pretrial confinement).

<sup>222</sup>*United States v. Plante*, 13 C.M.A. 266, 274, 32 C.M.R. 266, 274 (1962) (evidence of the accused's long and outstanding military service could be rebutted with a six-year old general court-martial conviction); *United States v. Colligan*, 39 C.M.R. 630, 631 (A.B.R. 1968) (cross-examination of the accused about prior nonjudicial punishment was permissible after the accused had testified about his military background, prior honorable discharge, and recommendation for promotion).

<sup>223</sup>34 C.M.R. 503 (A.B.R. 1963).

<sup>224</sup>*Id.* at 504-05. Long-standing military practice, the difficulties in obtaining character witnesses from home or past duty stations, and military due process were all cited. Difficulties in obtaining witnesses could apply equally to the prosecution, and was therefore an inadequate reason for the different treatment.

<sup>225</sup>*James* did not say that he had sent his wife any money, just simply that he had gone absent without leave in order to make money to send to her. *Id.*

ments. We do not know whether or not he could have successfully attacked or impeached the testimony of the witness upon cross-examination and this does not concern us. What we are concerned with, however, is the fact he did not have the opportunity to do so. The right of confrontation is basic within the framework of military justice and a part of military due process.<sup>226</sup>

The board can hardly be faulted for following the Manual,<sup>227</sup> but its reliance on military due process<sup>228</sup> as a justification for the adversarial nature of the presentence hearing is disturbing. That justification implies that the nature of the hearing could not be changed to a nonadversarial one, or that the rules could not be relaxed for the government as well by merely changing the Manual.

#### *7. Argument of Counsel.*

The Court of Military Appeals and the boards of review were not adverse to finding that the Manual's silence did not mean prohibition in other aspects of sentencing. Although there was no provision in the 1951 Manual for argument of counsel on sentencing, the practice of such argument was countenanced by an early Air Force Board of Review opinion.<sup>229</sup> The Court of Military Appeals approved the practice in 1956.<sup>230</sup> Had the court realized what a can of worms would result, it might well have reconsidered its decision. The plethora of decisions on the limits

<sup>226</sup>*Id.* at 505.

<sup>227</sup>Paragraph 75 did not prohibit the relaxation of evidentiary rules for the prosecution; it simply did not provide expressly for such relaxation. Paragraph 146b permitted affidavits to be used by the defense, indicating they were not normally admissible.

<sup>228</sup>In *United States v. Clay*, 1 C.M.A. 74, 1 C.M.R. 74 (1951), the Court of Military Appeals relied on a concept it characterized as "military due process" to enforce the statutory (rather than constitutional) rights given an accused by Congress. The court reversed a conviction because the members were not instructed on the presumption of innocence and the burden of proof. This amorphous concept became a means of applying constitutional protections to trials by courts-martial without expressly deciding that the Bill of Rights applied with full force to the members of the armed forces. Since Congress had never explicitly guaranteed a military accused the right to have the members properly instructed, the court was evidently finding rights in the "penumbra" of the UCMJ long before the United States Supreme Court legitimized the practice.

<sup>229</sup>*United States v. Weller*, 18 C.M.R. 473, 481-482 (A.F.B.R. 1954). The board noted there was no prohibition on such argument, and held that argument was permitted both sides, whether the other side chose to argue or not. The government could argue both first and last in cases where the defense chose to present argument.

<sup>230</sup>*United States v. Olson*, 7 C.M.A. 242, 22 C.M.R. 32 (1956).



of sentencing argument are beyond the scope of this article,<sup>231</sup> but the court's readiness to expand on the Manual's sentencing procedure in this area bears mention.

### 8. Sentencing Post-trial.

The post-trial review and action by the convening authority constituted a separate sentencing process, one which was subjected to considerable judicial scrutiny. Although the process of referring a record of trial to the staff judge advocate for review prior to action by the convening authority had existed under the Articles of War,<sup>232</sup> the UCMJ post-trial review<sup>233</sup> process was developed into the substantial equivalent of the federal presentence investigative report. The Court of Military Appeals closely monitored the information presented to the convening authority for his sentencing decision, with particular scrutiny of the information obtained in what were styled as "post trial clemency interviews."<sup>234</sup>

The development of the post-trial clemency interview highlights the paucity of the information available to the sentencing agency at trial. The necessity of instituting a formal procedure to obtain additional information from the accused and others illustrates the deficiencies of even the extenuation and mitigation procedures

<sup>231</sup>See Haight, *Argument of Military Counsel on Findings, Sentence and Motions: Limitations and Abuses*, 16 Mil. L. Rev. 59, 80-88 (1962); and Chilcoat, *Presentencing Procedure in Courts-Martial*, 9 Mil. L. Rev. 127, 143-149 (1960).

<sup>232</sup>A.W. 47.

<sup>233</sup>UCMJ art. 61.

<sup>234</sup>Since the convening authority could not increase the sentence adjudged by the members, any modification of the sentence could only be to the accused's benefit. Information obtained from the accused and other sources was presented to the convening authority to aid him in his sentencing decision. The practice was mandated by regulation in the Air Force:

[A] personal interview with the accused should be held after the trial whenever possible. At such an interview, after advising the accused of its purpose and of his rights, the interviewing officer should obtain a personal history, including the accused's story of his history, accomplishments, difficulties, future plans, reactions to his present situation, and any other similar information. Although he cannot be required to incriminate himself, he should be permitted to explain his commission of the offense of which convicted . . . . The interview need not be reported in detail, but the information obtained should be summarized together with the impressions made by the accused upon the interviewing officer and the latter's evaluation of the character and attitude of the accused.

Military Justice Circular No. 8, Section 502(3) (Dep't of Air Force, 1951), quoted in *United States v. McNeil*, 14 C.M.R. 710, 718 (A.F.B.R. 1954). The similarity of content and procedure in this process and that of a probation officer conducting a presentence report is striking. See *Presentence Inves. Rep.*, *supra* note 16.

available. The members were expected to adjudge a "legal, appropriate, and adequate punishment"<sup>235</sup> based on their knowledge of the offense and the accused—a punishment which was supposed to serve the needs of military society and the accused. Yet the clemency decision, which would have less far-reaching consequences for the accused and society, required additional information. Effectively, under this system, the sentence adjudged by the members was one for retribution and general deterrence purposes; the sentence as approved reflected the individualized concerns of rehabilitation and reformation.

In early decisions, the distinction between the clemency report and the staff judge advocate's post-trial review was not clearly drawn. The clemency report was not directly sanctioned by the Manual; it was either authorized by regulation, as in the Air Force,<sup>236</sup> or as an adjunct to the convening authority's nearly unfettered discretion to approve only so much of the sentence adjudged as he determined should be approved.<sup>237</sup> Since the contents of the clemency report were normally included in the post-trial review, the distinction was often blurred. It became significant only when restrictions on matters contained in the post-trial review began to surface.<sup>238</sup>

The treatment of clemency interviews by the boards of review and the Court of Military Appeals was originally very positive. The report, while not always favorable to an accused, did provide an opportunity for the accused to make his best case for clemency: "The accused's best chance for sentence reduction within the courts-martial processes, comes in the initial review. It is only at that level of the appellate procedure, that he can project his traits of character and his attitudes in a personal interview."<sup>239</sup>

The contents of the post-trial review and clemency report were the subject of numerous appellate challenges. The scope of the interview was extensive, including information from the accused

<sup>235</sup>MCM, 1951 para. 76a.

<sup>236</sup>The Air Force practice is discussed *supra* note 234.

<sup>237</sup>UCMJ art. 64; *United States v. Lanford*, 6 C.M.A. 371, 20 C.M.R. 87 (1955) (the convening authority could consider information bearing on clemency from any source; inclusion of such information in the post-trial review entirely proper). *But see United States v. Wise*, 6 C.M.A. 472, 20 C.M.R. 188 (1955) (improper for convening authority to take action on a case after he announced that, in view of the reduction in force of the Army, he would not consider returning to duty anyone who had received a punitive discharge as part of his sentence).

<sup>238</sup>Discussed *infra* text accompanying notes 263-269.

<sup>239</sup>*United States v. Coulter*, 3 C.M.A. 657, 660, 14 C.M.R. 75, 78 (1954).

and a variety of other sources about his military and civilian records, personal traits, family life, intelligence, employment record, patterns of behavior, and previous convictions.<sup>240</sup> Consideration by the convening authority of such of this information as was unfavorable to an accused was frequently challenged, but the Court of Military Appeals held that it was not error for the convening authority to consider previous records of nonjudicial punishment;<sup>241</sup> any other information contained in an accused's service record;<sup>242</sup> or juvenile convictions.<sup>243</sup> It was impermissible, however, for the staff judge advocate to include post-trial misconduct in his review.<sup>244</sup> This distinction is hard to square with the concept of individualized punishment. While the accused could not be punished for his post-trial misconduct, it was certainly a factor that could influence a decision to award clemency.

Problems of accuracy in the post-trial review and clemency report influenced the Court of Military Appeals to require that the accused be permitted to rebut any derogatory information furnished the convening authority.<sup>245</sup> To facilitate this rebuttal, the court suggested that the accused be provided a copy of the post-trial review,<sup>246</sup> an act it would later make mandatory.<sup>247</sup> The military was ahead of the federal courts in this regard; contents of presentence reports were not routinely disclosed to the defendant and his attorney until 1974.<sup>248</sup> Problems with challenges to the

<sup>240</sup>See, e.g., *id.* at 659-660, 665, 14 C.M.R. at 77-78, 83.

<sup>241</sup>*United States v. Lanford*, 6 C.M.A. 371, 376, 20 C.M.R. 87, 92 (1955). In his concurring opinion, Judge Latimer remarked:

While Article 15 punishments are not admissible for consideration by a court-martial, they are imposed as punishment for minor offenses and they disclose a definite pattern of military behavior. It is contrary to common sense to say they do not cast light on the desirability of retaining an accused in the service, and that is a proper matter to be considered in determining the appropriateness of a punitive discharge.

*Id.* at 99-100. In his concurring opinion, Judge Brosman indicated he would permit the convening authority and the boards of review to consider any pre or post-trial event which might influence the sentence. *Id.* at 103.

<sup>242</sup>*Id.*

<sup>243</sup>*United States v. Barrow*, 9 C.M.A. 343, 345, 26 C.M.R. 123, 125 (1958).

<sup>244</sup>*United States v. Vara*, 8 C.M.A. 651, 25 C.M.R. 155 (1958) (post-trial possession of marijuana while in the brig).

<sup>245</sup>*United States v. Sarlouis*, 9 C.M.A. 148, 150, 25 C.M.R. 410, 412 (1958); *Vara*, 8 C.M.A. 651, 25 C.M.R. 155.

<sup>246</sup>*Id.*

<sup>247</sup>See discussion of *United States v. Goode*, 1 M.J. 3, 50 C.M.R. 1 (C.M.A. 1975), *infra* text accompanying notes 267-269.

<sup>248</sup>Fed. R. Crim. P. 32(c)(3)(A).

accuracy of the report on appeal or collateral attack provided an impetus for the change.<sup>249</sup>

Another problem with the clemency interview was the source of the information—the accused. While it was the practice of the Air Force to give the accused rights warnings<sup>250</sup> prior to interviewing him, the Army Board of Review held it was not error to interview the accused post-trial without rights warnings.<sup>251</sup> The question of the right to counsel at such interviews also surfaced. Citing the voluntary nature of the interview, federal practice, and the lack of any requirement for counsel at a post-trial interview in regulations, the Navy Board of Review concluded that the accused had no right to counsel.<sup>252</sup> These issues would be addressed by the Court of Military Appeals after promulgation of the 1969 Manual.

### *E. SENTENCING 1969-1975*

#### *1. Manual Changes.*

The changes to the presentencing procedures made by the 1969 Manual were more fine-tuning than any major shift in direction. The adversarial nature of the presentencing hearing was maintained, in spite of the contrary federal practice. In fact, it took on more of the attributes of a mini-trial than before,<sup>253</sup> with provisions for argument of counsel<sup>254</sup> and the law-officer-to-military-judge transformation.<sup>255</sup> The trend toward expansion of the evidence available to the sentencing agency<sup>256</sup> continued, with modifications of the rules to permit consideration of more prior

<sup>249</sup>See, e.g., *United States v. Weston*, 448 F. 2d 626, 634 (9th Cir. 1971): "[A] sentence cannot be predicated on information of so little value as that here involved. A rational penal system must have some concern for the probable accuracy of the informational inputs in the sentencing process."

<sup>250</sup>UCMJ art. 31.

<sup>251</sup>*United States v. Powell*, 26 C.M.R. 521, 523 (A.B.R. 1958).

<sup>252</sup>*United States v. Canady*, 34 C.M.R. 709 (N.B.R. 1964).

<sup>253</sup>The concept that the sentencing hearing should take on the characteristics of a mini-trial, to include full confrontation and cross-examination rights is rejected in the introduction to the ABA Sentencing Standards. The federal procedure certainly cannot be characterized as a separate trial on the issue of punishment, contrary to the military practice.

<sup>254</sup>Manual for Courts-Martial, 1969 (Rev. ed.) [hereinafter MCM, 1969]. Counsel argument on sentence had been approved in *United States v. Olsen*, 7 C.M.A. 242, 22 C.M.R. 32 (1956), but had not been specifically authorized by the Manual prior to this.

<sup>255</sup>UCMJ art. 16 was amended by the Military Justice Act of 1968 to provide for trial by military judge alone, as well as to permit a court-martial to be constituted with members and a military judge.

<sup>256</sup>For the first time the accused could elect to be tried and sentenced by the military judge alone, rather than by the members.

convictions;<sup>257</sup> data from the accused's personnel file which reflected the nature of his prior service;<sup>258</sup> and consideration of evidence of uncharged misconduct.<sup>259</sup> As the defense already had the virtually unlimited right to introduce evidence, this effectively expanded presentation of information detrimental to an accused, although the evidence available was still considerably more limited than that available in the federal criminal system.<sup>260</sup>

<sup>257</sup>MCM, 1969, para. 75b(2) extended the time period for consideration of prior convictions from three years to six, and eliminated the requirement that the conviction have occurred during the current enlistment. Changes were also made in paragraph 127c, which permitted the maximum sentences to be enhanced upon proof of prior convictions. Dep't of Army, Pam No. 27-2, Analysis of Contents, Manual for Courts-Martial, United States, 1969, Revised Edition, para. 75b(2) (July, 1970) [hereinafter Analysis of Contents, MCM, 1969] indicated that the current enlistment limitation was removed to prevent an accused who had recently reenlisted to receive a windfall by the exclusion of any of his prior convictions.

<sup>258</sup>MCM, 1969 para. 75d expanded the documentary evidence which could be presented by the trial counsel on sentencing to include nearly anything in the accused's personnel file that service regulations permitted to be introduced and that the military judge felt was relevant to the sentencing inquiry. The term "personnel records" replaced "service record" since, in the Army, "service record" was a term of art referring to only a portion of the accused's personnel records. Analysis of Contents, MCM, 1969, para. 32f(4)(c). While the Analysis of Contents, para. 75d indicated: "The procedure contemplated by this change is similar to that under the Federal Rules of Criminal Procedure dealing with presentencing reports, but it limits items which may be considered to items contained in official records and accordingly puts the accused on notice of what may be considered against him," the drafters engaged in wishful thinking if they believed either that the contents of the personnel records were the substantial equivalent of the presentence report, or that the military judge would apply (or that the appellate courts would permit him to apply) the same minimal requirements of reliability as were applied in federal court.

<sup>259</sup>MCM, 1969, para. 76a provides in pertinent part: "Accordingly, the court may consider evidence of other offenses or acts of misconduct which were properly introduced in the case, even if that evidence does not meet the requirements of admissibility in 75b(2) and even if it was introduced for a limited purpose on the findings." This provision overruled *United States v. Turner*, 16 C.M.A. 80, 36 C.M.R. 236 (1966). The Analysis of Contents, MCM 1969, para 76a indicated the new rule was adopted with the express purpose of overruling the *Turner* decision, and commented:

[E]ven with the changes . . . the military procedure will be more lenient than that followed in the Federal system. . . . The added rule is both practical and logical. The primary purpose of limiting instructions is to foreclose the possibility of convicting the accused on the basis that he is a "bad man" with criminal dispositions or propensities rather than on the evidence relevant to the offense charged. The same consideration does not exist as to sentence. The fact that the accused is a "bad man" is the very type of thing that should be considered in determining an appropriate sentence.

<sup>260</sup>The use of uncharged misconduct evidence is discussed *supra* note 259. The sentencing agency could only consider evidence of uncharged misconduct properly introduced, and other adverse evidence from the personnel records of the accused. The federal courts could draw on evidence from a much broader variety of sources: preservice convictions and arrests (which might not be reflected in personnel records); data about the accused's educational background, family life,

Most of the Manual guides on the discretion of the members were removed, particularly any which smacked of efforts to reduce individualized sentence consideration.<sup>261</sup> These were replaced, to some extent, with a more detailed listing of factors to consider in the individual case through the military judge's instructions.<sup>262</sup> Since the Court of Military Appeals had already prohibited consideration of most of these guides (and the members had never been given any guidance on how to apply them), their elimination from the Manual had little direct impact on sentencing. There was a concern, almost bordering on paranoia, that anything which could influence the members in their sentencing decision was improper.

## 2. Sentencing Post-trial

Although the Court of Military Appeals had early expressed approval of broad-based sentencing information being available to the convening authority,<sup>263</sup> some back-tracking occurred, particularly when the information was not favorable to the accused. In 1972, the Court of Military Appeals ruled that the staff judge advocate could not include in his review sentencing evidence which had been excluded at trial, although the court stopped short of saying the convening authority could not consider it.<sup>264</sup>

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previous employment and financial condition; statements of co-accused and witnesses; and the assessment of the probation officer. *Presentence Inves Rep.*, *supra* note 16, at 7-17.

<sup>261</sup>The Analysis of Contents, MCM 1969 para. 76a indicated that the provisions of the 1951 MCM which dealt with the effect prior convictions should have on a sentence were deleted to avoid interfering with the court's discretion. *Mamaluy* dictated removal of the 1951 MCM provisions on sentence uniformity, the needs of local conditions, and the effect light sentences might have on the reputation of the armed forces. The provision that the maximum sentence should be reserved for aggravated offenses or those in which evidence of prior "convictions of similar or greater gravity" was introduced was also deleted, as "inconsistent with the theory that the matter of an appropriate sentence is entirely discretionary with the court." The change in the Manual provisions would have little direct impact on the members, at least, as they were no longer permitted to consult the Manual during their deliberations. *United States v. Rinehart*, 8 C.M.A. 402, 24 C.M.R. 212 (1957).

<sup>262</sup>Dep't of Army, Pamphlet No. 27-9, *Military Judge's Guide*, para. 8-2, 8-5 (May 1969) [hereinafter *Judge's Guide*] required the military judge to instruct the members to consider all the evidence in aggravation, extenuation, and mitigation, specifying the evidence to be considered, and to sentence the accused only for the offenses of which he was convicted. No guidance as to *why* to sentence was provided.

<sup>263</sup>*See, e.g., United States v. Lanford*, 6 C.M.A. 371, 20 C.M.R. 87 (1955).

<sup>264</sup>*United States v. Turner*, 21 C.M.A. 356, 357, 45 C.M.R. 130, 131 (1972). The distinction is one without much difference, but as the convening authority had unfettered discretion to approve, reduce, or disapprove a sentence, the court was evidently reluctant to restrict the matters which the convening authority could consider. If the evidence was brought to his attention in a document not part of the post-trial review, such as a clemency report, then the convening authority



Exclusion, deliberate or not, from the post-trial review of information favorable to the accused was likewise held to be error.<sup>265</sup> The Court of Military Appeals did not hesitate to review even the most miniscule omissions.<sup>266</sup>

In 1975, what has come to be known as the *Goode*<sup>267</sup> rule was judicially imposed, requiring the post-trial review to be served on the defense counsel before the convening authority took action on the case. The court's rationale for this requirement was summarized: "This case and others coming before the Court make it apparent that the post-trial review of the staff judge advocate has occasioned recurrent complaints about what should be included in it. Similar outcries have been voiced because of the misleading nature of certain reviews."<sup>268</sup> To some extent, *Goode* did for the post-trial process what the 1974 amendments to the Federal Rules of Criminal Procedure did for the presentence investigative report—made it more accurate.<sup>269</sup> On another level, however, the *Goode* decision and others reflected the Court of Military Appeals' concern about reliance on, as well as the accuracy of, information not structured by the rules of evidence or tested by an adversarial process.

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could presumably consider it, although the Court of Military Appeals might well disapprove of such end runs around its decisions.

<sup>265</sup>*United States v. Anderson*, 1 M.J. 86, 87 (C.M.A. 1975) (summary of evidence omitted the testimony of the accused's battalion commander about his original recommendation of level of court and subsequent reservations about his decision; held to be error); *United States v. Edwards*, 23 C.M.A. 202, 48 C.M.R. 954 (1974) (all favorable information known to the staff judge advocate must be included in the post-trial review); *United States v. Walker*, 1 M.J. 39, 50 C.M.R. 323 (1975) (error to omit from post-trial review battalion commander's recommendation that the accused not be eliminated).

<sup>266</sup>*See, e.g., United States v. Horton*, 23 C.M.A. 365, 49 C.M.R. 824 (1975). The court actually reviewed (without finding error) an allegation that the post-trial review was defective in failing to point out that, in a statement of the accused's personal history which accompanied the letter transmitting the charges and recommending a court empowered to adjudge a punitive discharge, the unit commander had indicated the accused had rehabilitative potential.

<sup>267</sup>*United States v. Goode*, 1 M.J. 3, 6, 50 C.M.R. 1, 4 (1975).

<sup>268</sup>*Id.*

<sup>269</sup>Concerns about the accuracy of information in the presentence report were the major impetus for the disclosure requirement of the 1974 amendments to Fed. R. Crim. P. 32(c). The current version of Rule 32(c) requires disclosure a reasonable time before imposing sentence, and permits the defense to introduce evidence, in the discretion of the court, to rebut any factual inaccuracy in the report. As to any alleged error, the court must either make a finding (presumably whether the information reported was accurate) or determine that no finding is necessary because the court will not consider the controverted matter. Fed. R. Crim. P. 32(c)(2)(D).

### 3. *Convictions and Personnel Records.*

The expanded evidence of prior convictions and information from the personnel records of the accused were fruitful areas of appellate litigation after the promulgation of the 1969 Manual. There were few challenges to the accuracy of such information, but many to its admissibility, both on policy and evidentiary grounds. The prior convictions rule was almost immediately revised by the Court of Military Appeals, as it violated the "spirit" of the Executive Order which promulgated the 1969 Manual.<sup>270</sup> The President had directed that changes in maximum punishments would not detrimentally affect those accused whose offenses occurred prior to the effective date of the new Manual. Since evidence of prior convictions could be considered by the sentencing agency, presumably resulting in a more severe sentence, the court held that convictions more than three years old or occurring in a prior enlistment were not admissible unless the offense for which the accused was being tried occurred after the effective date of the new Manual.<sup>271</sup>

The finality of a conviction was a condition precedent to its admission, but the Manual was not clear about how finality had to be shown, or who had the burden of demonstrating lack of finality.<sup>272</sup> Why finality was required at all is difficult to discern, particularly in view of the modifications of the rules to permit consideration of uncharged misconduct or other evidence of the character of the accused's service. The federal practice certainly did not require any showing of finality.<sup>273</sup> The military finality

<sup>270</sup>United States v. Griffin, 19 C.M.A. 348, 349, 41 C.M.R. 348, 349 (1970).

<sup>271</sup>*Id.* at 349-350, 41 C.M.R. at 349-350. The court found that the practical effect of the provision was to increase punishments, and therefore concluded it violated the Executive Order. The Executive Order, however, reflected only a concern about increased maximum punishments, not about a speculative potential impact on a sentence within the maximum.

<sup>272</sup>MCM, 1969, para 75b(2). The Analysis of Contents, MCM, 1969 para. 75b(2) indicated that service regulations differed in their requirements to post the completion of appellate review to the service record or other documents which could be used to prove the conviction. When regulations required completion of review to be posted, and the document did not reflect completion of review, the "presumption of regularity" would prohibit introduction, since the pendency of appellate review could be presumed. If the service regulation or other authority did not require the results to be posted, and sufficient time for completion of appellate review had passed, completion of review could be presumed. It would have simplified matters considerably to allow the prosecution to introduce the prior convictions, subject to defense objection that review had not been completed (rather than permitting objection based on a failure of the document to demonstrate completion of appellate review). If completion of appellate review was really the issue, this rule would better accomplish that purpose.

<sup>273</sup>Fed. R. Crim. P. 32(c)(2) requires that the presentence report contain information about the defendant's prior criminal record, not merely prior conviction.

rule had an historical basis, and, all logic aside, that was apparently enough.<sup>274</sup>

Personnel records did provide a more complete picture of the accused's background for the sentencing agency, although both the Manual and regulations imposed certain restrictions on which records could be presented.<sup>275</sup>

Acceptance of this new rule did not come easily. The authority of the President to make administrative records, particularly those of nonjudicial punishment, admissible in sentencing survived a spirited attack:

The grant of permissive authority to present optional materials from an accused's personnel records before sentencing by a court-martial having a military judge has an analogue in the presentence investigation under Rule 32 of the Federal Rules of Criminal Procedure. . . . Although the use of records of Article 15 punishment seems completely consistent with the practice in United States district courts, our decision depends on whether the provision for the use of evidence of nonjudicial punishment before sentencing is a valid exercise by the President of a congressional grant of authority. . . . We perceive nothing in the legislative history of Article 15 that is inconsistent with use of records of the nonjudicial punishment by a court-martial when it is deliberating on an appropriate sentence.<sup>276</sup>

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tions. See also *United States v. Cifarelli*, 404 F.2d 512 (2d Cir.), cert. denied, 393 U.S. 987 (1968) (the trial judge may consider evidence of crimes of which the defendant was neither tried nor convicted in determining sentence). Cf. *United States v. Metz*, 470 F.2d 1140, 1143 (3d Cir. 1972), cert. denied, 411 U.S. 919 (1973) (indictments for other criminal activity are sufficiently reliable to be considered by the sentencing judge).

<sup>274</sup>The original rules permitting introduction of prior convictions required finality. *G. Davis*, *supra* note 122, at 148. *United States v. West*, 49 C.M.R. 71 (A.C.M.R. 1974) (holding that lack of notation as to completion of supervisory review rendered the prior conviction inadmissible). Even if the conviction were subsequently overturned, that fact should not affect consideration of the prior conviction in imposing sentence: a preponderance standard is constitutionally sufficient for consideration of evidence at sentencing. *Metz*, 470 F.2d 1140.

<sup>275</sup>MCM, 1969, para. 75d limited consideration to those documents which reflected the character of the accused's prior service. Admissibility could be further restricted by the discretion of the military judge. AR 27-10 para. 2-20 (Nov. 1968) prohibited consideration of efficiency reports. See also *United States v. Bailey*, 46 C.M.R. 766, 768 (N.C.M.R. 1972) (holding that admission of a statement in a performance evaluation that the accused desired to get out of the Navy by any means did not reflect the past conduct and efficiency of the accused and was therefore inadmissible).

<sup>276</sup>*United States v. Johnson*, 19 C.M.A. 464,466-467, 42 C.M.R. 66, 68-69 (1970).

Relevancy challenges were also made, with a similar lack of success.<sup>277</sup>

Deficiencies within the records themselves resulted in some challenges, not due to the accuracy of the records, but rather on grounds that the records were not properly filed.<sup>278</sup> This contrasts with the federal system, where only accuracy of the information is important. The federal approach was a more sensible one for the drafters of the Manual to have followed.

#### 4. Extenuation and Mitigation Evidence.

The Court of Military Appeals was clearly biased in favor of evidence which would individualize a sentence, particularly in the accused's favor. *United States v. Burfield*<sup>279</sup> reflected that bias. In ruling that the trial judge had erred in excluding a stipulation of expected testimony from a psychiatrist that the accused was not likely to repeat his offense, the court established a standard for evaluating the relevance of sentencing evidence: will the witness or information be helpful to the court in adjudging an appropriate sentence or serve as a ground for a later clemency review.<sup>280</sup> The court expounded on sentencing philosophy as well:

In determining a punishment, sentencing instrumentalities now look beyond the act that an accused has committed. Today, psychiatric evaluations of offenders and the nature of their behavior are often considered. Whether such behavior is likely to be repeated or is an

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The court went on to hold that counsel at Article 15 proceedings was not a prerequisite to their admissibility, as they were not considered prior convictions, see *United States v. Tucker*, 404 U.S. 443 (1972) (prohibiting consideration of uncounseled prior convictions in imposing sentence), and were not used as recidivist provisions to permit enhanced punishment; see, e.g., *Burgett v. Texas*, 389 U.S. 109 (1967) (barring use of uncounseled prior convictions to invoke habitual criminal statute). The court did prohibit consideration of nonjudicial punishment if the offense occurred prior to the effective date of the new Manual. Judge Ferguson concurred in the result only. He felt that use of nonjudicial punishment in this manner was inconsistent with the intent of Congress in enacting UCMJ art. 15. *Johnson*, 19 C.M.A. at 469, 471, 42 C.M.R. at 71, 73-74.

<sup>277</sup>*United States v. Montgomery*, 20 C.M.A. 35, 38, 42 C.M.R. 227, 230 (1970) stated: "Before the Manual change an accused could introduce favorable material from his service records. The prosecution's use of unfavorable material from the same source does not make the information any less relevant." Judge Ferguson dissented.

<sup>278</sup>See, e.g., *United States v. Cohen*, 23 C.M.A. 459, 43 C.M.R. 309 (1971); *United States v. Menchaca*, 47 C.M.R. 709, 716 (A.F.C.M.R. 1973) (also holding that consideration of such records by the convening authority was error).

<sup>279</sup>22 C.M.A. 321, 46 C.M.R. 321 (1973).

<sup>280</sup>*Id.* at 322.

isolated aberration on the accused's part is obviously of importance in determining the sentence to be imposed.<sup>281</sup>

The rehabilitative model of punishment was in full bloom.

### 5. *The Philosophy of Sentencing.*

Little, other than concern that the accused receive individual consideration and punishment, could justify the results in *United States v. Lacey*.<sup>282</sup> The Court of Military Appeals found error in the convening authority's statement of reasons for rejecting the military judge's clemency recommendation. The convening authority said that larceny was so prejudicial to discipline and order that it dictated immediate removal from the Navy.<sup>283</sup> General deterrence and the denunciation value of such sentences were apparently not appropriate sentencing concerns.<sup>284</sup> Further evidence of the demise of general deterrence and denunciation as a basis for sentencing military offenders can be found in *United States v. Hill*.<sup>285</sup> In adjudging sentence on an accused convicted of selling heroin, the military judge remarked: "Now you take that message back to those other pushers."<sup>286</sup> The Court of Military Appeals held that this violated the principle of individualized consideration established in *United States v. Mamaluy*.<sup>287</sup>

<sup>281</sup>*Id.*

<sup>282</sup>23 C.M.A. 334, 49 C.M.R. 738 (1975).

<sup>283</sup>*Id.* at 335, 738.

<sup>284</sup>Perhaps a different result would have obtained if the convening authority had said that *this* larceny was prejudicial to discipline and order, showing his individualized concern. In defense of the holding, federal appellate courts had demonstrated a similar concern over unduly rigid sentencing criteria which reflected a lack of individualized concern. See, e.g., *United States v. Wardlaw*, 576 F.2d 932, 937-938 (1st Cir. 1978) (harsh sentence on drug couriers imposed in an effort to force large drug traffickers out of business was "an impermissible approach to the sentencing process"); *United States v. Daniels*, 440 F.2d 967 (6th Cir. 1971) (trial judge's sentence of nearly all selective service violators to the maximum penalty reflected an inflexible attitude in defiance of a requirement to sentence individually). The difference between the federal civilian cases and *Lacey* is that the penalties imposed in the federal cases were clearly disproportionate for the particular offender, while in *Lacey*, there was no evidence at all that the sentence was disproportionate. The military judge, enjoined to adjudge an appropriate sentence without reliance on possible mitigation by higher authority (see Judge's Guide, para. 8-2) sentenced the accused to a punitive discharge. The convening authority's reasons for approving the adjudged sentence are not relevant to the question of adequacy of individualization.

<sup>285</sup>21 C.M.A. 203, 44 C.M.R. 257.

<sup>286</sup>*Id.* at 206, 260.

<sup>287</sup>10 C.M.A. 102, 27 C.M.R. 176 (1959). This contrasts with the opinion of the Army Court of Military Review in *United States v. Harper*, 49 C.M.R. 795 (A.C.M.R. 1975): "The remaining assignments of error are without merit. One approaches fatuity, namely that it is error for trial counsel to argue that deterrence of others is a proper consideration in sentencing."

Earlier, in *United States v. Rodriguez*,<sup>288</sup> the court had prohibited the members from considering evidence of uncharged misconduct on sentencing. This decision was difficult to justify, given the court's bent toward individualization of punishment, since previous bad acts would seem to be highly relevant to the punishment an individual should receive. The court was apparently concerned that the accused would be sentenced for the uncharged acts as well. The difference is only of concern to philosophical purists, and that problem could, in any event, be cured by an instruction to sentence only for the offenses of which the accused was convicted. The drafters' amendments in the 1969 Manual to permit consideration of uncharged misconduct in imposing sentence were grudgingly accepted by the Court of Military Appeals,<sup>289</sup> but were characterized as *ex post facto* in effect for offenses arising before the effective date of the new 1969 Manual.<sup>290</sup>

## F. 1975-1980 SENTENCING AND THE FLETCHER COURT

### 1. Introduction.

In 1975, Albert C. Fletcher became the Chief Judge of the Court of Military Appeals. He soon demonstrated the same sort of bias against sentencing evidence unfavorable to an accused which had characterized Senior Judge Ferguson's opinions.<sup>291</sup> The replacement of Senior Judge Ferguson with Judge Perry a year later did not constitute much of an improvement, from the government perspective, at least. When coupled with Judge Cook's bias against any consideration of general deterrence as a factor in sentencing an accused, the Fletcher Court era would not be an easy one for the trial counsel seeking to introduce evidence during the presentencing phase.

### 2. Sentencing Philosophy.

Two decisions of the Fletcher court, *United States v. Mosely*<sup>292</sup> and *United States v. Booker*<sup>293</sup> caused a substantial portion of

<sup>288</sup>17 C.M.A. 444, 37 C.M.R. 318 (1967).

<sup>289</sup>*United States v. Worley*, 19 C.M.A. 444, 446, 42 C.M.R. 46, 48 (1970) held that promulgation of MCM, 1969, para. 76a "reflects a permissible exercise of authority granted the President, earlier case law not withstanding."

<sup>290</sup>*United States v. Mallard*, 19 C.M.A. 457, 42 C.M.R. 59 (1970).

<sup>291</sup>See, e.g., *United States v. Montgomery*, 20 C.M.A. 35, 40, 42 C.M.R. 227, 232 (1970) (Ferguson, J., dissenting); *United States v. Johnson*, 19 C.M.A. 464, 469, 42 C.M.R. 66, 71 (1970) (Ferguson, J., concurring in the result).

<sup>292</sup>1 M.J. 350 (C.M.A. 1976).

<sup>293</sup>5 M.J. 238 (C.M.A. 1977), modified, 5 M.J. 246 (C.M.A. 1978).



the subsequent presentencing appellate litigation. In *Mosely*, Judge Cook eliminated deterrence as a valid sentencing consideration in the military. Dismissing the federal courts' approval of deterrence of others as a sentencing goal,<sup>294</sup> Judge Cook concluded that the military's sentencing system was based on a concern for deterrence of individual offenders, while general deterrence was a proper factor only in setting the maximum limit on sentence in each offense. Individual deterrence was a proper concern of the sentencing agency; general deterrence was a proper concern for the President.<sup>295</sup> Judge Cook's curious explanation for prohibiting argument on general deterrence as a factor in sentencing certainly had no basis in the history of military sentencing philosophy. It was *individual* deterrence that was of relatively recent manufacture as a sentencing concern in the military.<sup>296</sup> While the UCMJ and the 1951 Manual had placed a somewhat greater emphasis on sentencing the individual as well as punishing the offense, the primary emphasis of the 1951 Manual was still clearly on general deterrence, retribution, and denunciation.<sup>297</sup> Individualization of sentences was a Court of Military Appeals and board of review creation, not that of the President or Congress.

Judge Cook's ill-conceived decision opened the floodgates of appellate litigation to claims of error in even a passing reference to the effect a sentence might have on others.<sup>298</sup> In particularly

<sup>294</sup>See, e.g., *United States v. Foss*, 501 F.2d 522, 528 (1st Cir. 1974) (while rigidly imposing mechanistic sentencing criteria is improper, deterrence of others is still a legitimate goal of sentencing).

<sup>295</sup>*Mosely*, 1 M.J. at 351.

<sup>296</sup>See discussion of the sentencing guidelines in the 1917 MCM, *supra* text accompanying notes 135-143. Only in 1951 were the members first provided with information to aid them in individualizing sentence.

<sup>297</sup>MCM, 1951, para. 76a does not list the mitigating factors introduced about an individual as a factor to be considered in imposing sentence. While the members could undoubtedly consider them, or there would be no reason to permit introduction of such evidence, their importance was certainly not emphasized by the drafters. Other individual factors, such as the character of the accused's service as shown by prior discharges and convictions, were mentioned as proper sentencing considerations, but this hardly equates to a mandate to individualize the sentence to the exclusion of other sentencing concerns listed: uniformity, the needs of local conditions, and the nature of the offense.

<sup>298</sup>In a series of cases, the Air Force Court of Military Review held the trial counsel's reference to general deterrence harmless: *United States v. Griffin* 1 M.J. 884 (A.F.C.M.R. 1976); *United States v. Adams*, 1 M.J. 877 (A.F.C.M.R. 1976); *United States v. Grey*, 1 M.J. 874 (A.F.C.M.R. 1976) (all involving trial by military judge alone); and *United States v. Porter*, 1 M.J. 882 (A.F.C.M.R. 1976) (trial by members, but the military judge had given a curative instruction). In other cases, the Air Force court was simply unwilling to find that a passing reference to general deterrence, among other sentencing considerations, in the trial counsel's argument could result in a sentence which was "inappropriately severe." *United*

well-reasoned arguments, Senior Judge Clause and Judge Costello of the Army Court of Military Review, concurring in *United States v. Lucas*,<sup>299</sup> urged the Court of Military Appeals to consider what it had done in *Mosely*. Senior Judge Clause equated military discipline with general deterrence, and suggested that the Court of Military Appeals could not seriously mean that the needs of discipline within a unit could not be considered in adjudging an appropriate sentence.<sup>300</sup> Judge Costello challenged Judge Cook's theory that general deterrence was only relevant as a consideration in fixing the maximum punishment for offenses:

Deterrence theory has a place in military sentencing procedures today, just as it does in civilian practice. . . . The statement that application of deterrence theory results in a sentence higher than that which "otherwise would have been imposed" proceeds from a view of the criminal and his act which assumes that they can, somehow, be treated as separate from the society in which they existed when the act was committed and in which they continue to exist. In this sense, crime is a social act, an act denominated criminal because it has adverse consequences for others than the actor. When such an act is found to have been committed, the burdens of the wider consequences also fall upon the actor according to the demands of fairness. Given that calling one criminal severely to task will deter others from doing the same, each criminal then incurs the risk of becoming an occasion for society's lesson-teaching. Thus, there is no "otherwise would have been imposed" that might be considered. Punishment removed from the societal context is totally inconsistent with the view of crime as a social act.<sup>301</sup>

Fortunately, *Mosely* had a short (but active) life.<sup>302</sup> The decision

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*States v. Wilson*, 2 M.J. 683 (A.F.C.M.R. 1976). The Navy Court characterized an argument that "the interests of the Navy in deterring assaults would demand the members award the maximum sentence" as one not involving general deterrence, since the trial counsel did not specifically refer to deterring others. *United States v. Nixon*, 2 M.J. 609, 610 (N.C.M.R. 1977).

<sup>299</sup>2 M.J. 834 (A.C.M.R. 1976).

<sup>300</sup>*Id.* at 836.

<sup>301</sup>*Id.* at 839 (Costello, J., concurring).

<sup>302</sup>*Mosely* was effectively overruled four years later by *United States v. Lania*, 9 M.J. 100 (C.M.A. 1980) discussed *infra* text accompanying notes 384-87. Prior to *Lania*, other Court of Military Appeals decisions had reduced *Mosely's* sting: See, e.g., *United States v. Varacalle*, 4 M.J. 181 (C.M.A. 1978) (a 1-1-1 opinion by the court, the Chief Judge finding that *Mosely* was too broad and that general deterrence could be considered as one of the factors in sentencing, Judge Perry contending that the trial judge did not really rely on general deterrence, and Judge

can stand for the proposition that, while "the ethical interests served by punishment and reasoned choices among such competing interest is the business of both judges and ethicists"<sup>303</sup> judges should hesitate before elevating their individual views of the morality of punishment to a rule of law for an entire system of justice.

### 3. Government Sentencing Evidence.

The *Booker* decision and its progeny continued the trend of hyper-technical evaluation of government sentencing evidence. That approach to admission of convictions and personnel records was not, of course, entirely the unfettered choice of the Court of Military Appeals; the drafters of the 1969 Manual had chosen to allow the admission of these documents, but apparently had not chosen to otherwise relax the rules of evidence for the government during this phase of the trial. A document from an accused's personnel file was now relevant to sentencing, but its admissibility could still be challenged. The Court of Military Appeals simply decided to take a hard line on the admissibility challenges, based on due process grounds, if not the formal rules of evidence.

The Court of Military Appeals, ostensibly relying on Supreme Court precedents that uncounseled prior convictions could not be used to enhance punishment,<sup>304</sup> restricted consideration of records of nonjudicial punishment<sup>305</sup> and records of summary court-martial<sup>306</sup> unless there was clear proof the accused had received or waived counsel. In so doing, the majority glossed over the fact that convictions by summary courts-martial are not criminal convictions<sup>307</sup> and proceedings under the provisions of Article 15, UCMJ are administrative, not judicial.

Figuring out exactly what *Booker* meant was not an easy task.<sup>308</sup> While the decision directly concerned only the use of

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Cook steadfastly holding to his opinion in *Mosely*). See also Basham, *General Deterrence Arguments*, *The Army Lawyer*, Apr. 1979 at 5.

<sup>303</sup>*Lucas*, 2 M.J. at 838.

<sup>304</sup>*Argersinger v. Hamlin*, 407 U.S. 25 (1972) (absent a knowing and intelligent waiver of the right to counsel, no one may be imprisoned for an offense unless represented by counsel); *United States v. Tucker*, 404 U.S. 443 (1972), (uncounseled convictions may not be considered in imposing sentence); and *Burgett v. Texas*, 389 U.S. 109 (1967) (uncounseled prior convictions may not be used to invoke habitual criminal statutes).

<sup>305</sup>UCMJ art. 15.

<sup>306</sup>UCMJ art. 20.

<sup>307</sup>*Middendorf v. Henry*, 425 U.S. 25 (1976).

<sup>308</sup>See Cooke, *Recent Developments in the Wake of United States v. Booker*, *The Army Lawyer*, Nov. 1978, at 4 for an excellent analysis of the many ambiguities of the *Booker* decision.

uncounseled summary court-martial convictions to invoke the "escalator clause"<sup>309</sup> of paragraph 127c of the 1969 Manual, dicta in the decision addressed the admission of uncounseled convictions contained in personnel records as evidence of the nature of the accused's prior service<sup>310</sup> and the use of uncounseled Article 15 proceedings in a similar manner.<sup>311</sup> Curiously, the Chief Judge relied on the due process clause of the fifth amendment to suggest that only those records of prior punishment in which counsel was provided or validly waived could be introduced on sentencing. While the fifth amendment could conceivably be used as a basis to require counsel in the earlier proceedings, due process was a minimal concern of federal court decisions on what could constitutionally be considered in the sentencing process.<sup>312</sup>

Exactly how a waiver of the right to counsel and the right to trial could be demonstrated was left up in the air; the Chief Judge's opinion was that a mere check mark on a form could not constitute a voluntary and intelligent waiver of an accused's rights under the standards of *Johnson v. Zerbst*.<sup>313</sup>

*United States v. Mathews*<sup>314</sup> eventually settled the question of *Booker's* dicta references to Article 15 records; the same rules would apply to their use for indirectly enhancing punishment: waiver of the right to demand trial and to consult counsel must be shown before the records could be considered. *United*

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<sup>309</sup>The so-called "escalator clause" permitted the maximum punishments listed in the Table of Maximum Punishments, MCM, 1969, para. 127c, to be enhanced upon proof of prior court-martial convictions.

<sup>310</sup>*Booker*, 5 M.J. at 243-244.

<sup>311</sup>*Id.*

<sup>312</sup>See, e.g., *Williams v. New York*, 337 U.S. 241 (1949) (no due process violation to consider hearsay evidence not disclosed to the defendant; no requirement that the defendant be given the opportunity to rebut such information). In *United States v. Weston*, 448 F.2d 626, 632 (9th Cir. 1971), the Ninth Circuit commented that the only constitutionally impermissible sentencing concerns were unconstitutionally obtained evidence; penalizing a defendant for the exercise of a constitutional right (such as pleading not guilty or appealing a conviction); evidence of prior convictions which was factually incorrect; uncounseled convictions (although, apparently the fact of the arrest could be considered); and other information which was not factual.

<sup>313</sup>304 U.S. 458 (1938). *Booker*, 5 M.J. at 244. *Booker* imposed a requirement that the waiver be in writing. *Id.* Judge Fletcher also suggested that an inadequate written showing of waiver could be supplemented by an inquiry of the accused by the trial judge. In the guise of implementing the due process requirements of the fifth amendment, the Chief Judge was willing to overlook the self-incrimination aspects of such an inquiry. While, strictly speaking, such an inquiry might not "incriminate" an accused, it was probably not going to work for his benefit. If the due process clause could prohibit consideration of uncounseled punishment proceedings, then surely it could encompass the process of establishing the admissibility of records of nonjudicial punishment from the accused himself.

<sup>314</sup>6 M.J. 357 (C.M.A. 1979).

*States v. Syra*<sup>315</sup> provided further indications that the *Booker* decision was not based on constitutional infirmities in the prior summary courts-martial and Article 15 proceedings, but rather on the Court of Military Appeals' concern about the fairness of such proceedings. *Syra* provided that only summary courts-martial and Article 15 proceedings conducted after the *Booker* decision would have to demonstrate compliance with the waiver rules. *Booker* would not apply retroactively.<sup>316</sup> Clearly then, *Booker* and its progeny were another effort by the Court of Military Appeals to impose the beliefs of individual judges about what was fair in the sentencing process on the armed forces. Certain language in the decision suggests that *Booker* was not really a sentencing case, but the court's attempt to impose certain due process standards on the summary court-martial and Article 15 proceedings by making their records inadmissible at subsequent criminal proceedings.<sup>317</sup> No wonder Brigadier General Donald W. Hansen expressed the view that records of Article 15 punishment should not be admissible at courts-martial;<sup>318</sup> the requirements imposed on nonjudicial punishment proceedings in order to render them admissible at trial were simply not worth the cost.

None of the courts of military review were happy with *Booker*, but the Navy Court of Military Review was the most vocal. The court pointed out that the Congressional decision to deny those aboard ship the right to refuse nonjudicial punishment and the unavailability of counsel under such circumstances made a waiver rule inapplicable; and the fundamentally different nature of the military justice system required different standards of due process.<sup>319</sup> The criticism became scathing at times:

I believe *Booker* sets out bad law, which substantially changes the military justice-discipline system in the armed forces. I believe that this change is detrimental to the justice system and detrimental to the disciplinary structure of the armed forces.... The *Booker* rule requires that an offender be punished at court-martial,

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<sup>315</sup>7 M.J. 431 (C.M.A. 1979).

<sup>316</sup>Certainly, retroactivity is not required in all decisions based on constitutional grounds. See, e.g., *Linkletter v. Walker*, 381 U.S. 618 (1965) (declining to apply the exclusionary rule for fourth amendment violations retroactively). The decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963) giving indigent defendants the right to counsel at trial was applied retroactively, however. *Doughty v. Maxwell*, 376 U.S. 202 (1964).

<sup>317</sup>This interpretation of *Booker* was discussed in *Cooke*, *supra* note 308, at 6.

<sup>318</sup>1 Adv. Comm. Rep., *supra* note 15, at 108, 113-14 (testimony of Brigadier General Hansen at committee hearing).

<sup>319</sup>*United States v. Lecolst*, 4 M.J. 800 (N.C.M.R. 1978).

without recourse to his past service conduct. It requires uninformed decision making by sentencing authorities. . . . It erroneously assumes Commanding Officers are inept. Its effect is detrimental to the security of this country. . . .<sup>320</sup>

The Navy court responded by attempting to "out-due-process" the Chief Judge by applying literally the language of *Booker*, and finding that forms could not show a valid waiver.<sup>321</sup> The Army court responded by ignoring the Chief Judge's disparagement of "check marks" as insufficient evidence of waiver, and holding that a properly completed Department of the Army Form 2627, Record of Nonjudicial Punishment, satisfied the requirements of *Booker*.<sup>322</sup>

*Booker's* attempts to impose due process requirements not mandated by the President or Congress on the presentencing process remain a factor to be considered in determining what evidence should be admissible at a presentencing hearing. If *Booker*-type due process is the price of admissibility of nonjudicial punishment records, or those of other administrative hearings, the price may indeed be too high. If, however, *Booker* and its progeny were merely the Chief Judge's attempt to restructure the presentencing system to comport with his notions of fairness, then the rules governing admissibility of records of punishment under Articles 15 and 20 of the UCMJ could be rewritten to ease the "due process" requirements.

#### 4. Sentencing Post-Trial.

The post-trial clemency interview met its demise in another of the Chief Judge's undertakings, *United States v. Hill*.<sup>323</sup> While ruling that rights warnings<sup>324</sup> were not necessary at such interviews, the court held that counsel was required.<sup>325</sup> The Court of Military Appeals had initially compared such interviews and reports to the federal presentence investigation,<sup>326</sup> a process

<sup>320</sup>*Id.* at 805 (Newton, S.J., concurring and dissenting).

<sup>321</sup>See, e.g., *United States v. Davis*, 6 M.J. 969 (N.C.M.R. 1978) (a long statement acknowledging right to counsel and waiver thereof on a summary court-martial record did not demonstrate an understanding of the ramifications of foregoing a right to a criminal trial).

<sup>322</sup>*United States v. Williams*, 7 M.J. 725 (A.C.M.R. 1979); accord *United States v. Howard*, 7 M.J. 962 (A.C.M.R. 1979); *United States v. Arvie*, 7 M.J. 768 (A.C.M.R. 1979).

<sup>323</sup>4 M.J. 33 (C.M.A. 1977).

<sup>324</sup>UCMJ art. 31.

<sup>325</sup>*Hill*, 4 M.J. at 34.

<sup>326</sup>See *supra* text accompanying notes 232-252.



without the involvement of counsel.<sup>327</sup> In spite of the previous analogies to the federal practice,<sup>328</sup> the court concluded that the post-trial responsibilities of the defense counsel included representation at a clemency interview. *Hill* drew clearly the distinction between the clemency interview and the post-trial review,<sup>329</sup> but concluded that, while the convening authority's discretion might not be limited, limits could be imposed on the manner in which clemency information was obtained.

Interestingly, the Chief Judge took the opportunity in *Hill* to critique the military system for its failure to conform to the federal civilian model. In addition to the obvious deficiency of "jury"<sup>330</sup> sentencing, the most serious deficiency was the lack of anything resembling the federal presentence report.<sup>331</sup> This was somewhat of an anomalous position for an appellate judge who had set up numerous roadblocks to the admissibility of adverse sentencing evidence—evidence which would have been readily considered in federal courts. Perhaps his decisions on admissibility of sentencing evidence in courts-martial were influenced by the fact that members often sentenced the accused. His decisions may have reflected a distrust of the impartiality of preparers of administrative records as well. Whatever the reason, the divergence in the Chief Judge's positions that the military should adopt a presentence report, and decisions requiring the government to tag each base before admitting sentencing evidence was somewhat incongruous.

<sup>327</sup>*Estelle v. Smith*, 451 U.S. 454, 470 (1981) establishing that the penalty portion of a trial was a "critical stage" for purposes of the sixth amendment right to counsel. The Court distinguished between the right to the assistance of counsel prior to an interview with someone who would render a report to be used on sentencing and the right to have counsel present during the interview. *Id.* at 470 n.14. The ABA Standards for Criminal Justice, the Defense Function, § 4-8.1 (1982) does not suggest that counsel should be present during the presentence interview, which is not intended to be an adversary process. See *Presentence Inves. Rep.*, *supra* note 16, at 3-4.

<sup>328</sup>The portion of the Air Force military justice regulation governing post-trial clemency interviews was set forth in an appendix to the *Hill* decision. It bears a remarkable resemblance to the federal guide for preparing a presentence investigative report, *supra* note 16.

<sup>329</sup>*Hill*, 4 M.J. at 39 n.26.

<sup>330</sup>The former Chief Trial Judge of the Army, Colonel James G. Garner, has taken strong exception to the practice of referring to sentencing by members as "jury" sentencing. Judge Garner pointed out the distinctions in his testimony before the Advisory Committee: "I want to make it absolutely clear, it is not a jury; it was never designed to be a jury. . . . it was designed to be a blue ribbon panel. They were to be picked because of their expertise and their knowledge. . . . They're a military panel picked for their expertise in things military and in making decisions, and understanding the requirements of the military." 1 Adv. Comm. Rep., *supra* note 15, at 116 (transcript of hearings).

<sup>331</sup>*Hill*, 4 M.J. at 37 n.18.

Not all Fletcher court opinions on sentencing evidence were anti-government. Building on the precedent in *United States v. Burfield*,<sup>332</sup> the court held that the government could rebut evidence that the accused no longer needed to be confined with expert testimony that the accused was likely to commit the same offenses if released, and that the accused was an accomplished liar.<sup>333</sup> The court acknowledged the differences between the military and the civilian practice:

Military law limits the kind of matter adverse to an accused that the Government may present during the sentencing portion of a trial... the military practice does not authorize "a completely full hearing" comparable to the "full-type presentencing report" used in the civilian courts. The limitation in issue here is that which requires government evidence to qualify as "rebuttal" to that presented by the accused.<sup>334</sup>

While the government was initially prohibited from introducing evidence of the accused's potential for recidivism, it could do so to rebut defense evidence on the lack of need for further rehabilitation. This limitation on the government was proper, based on paragraph 75 of the 1969 Manual; the question that should have been asked was: did the restrictions of the Manual make sense?

The Manual limited the government's sentencing case in chief to matters reflecting the character of the accused's previous service.<sup>335</sup> The Court of Military Appeals interpreted this provision rather broadly in ruling that the reasons for an accused's removal from a nuclear duty position were a valid matter for further inquiry by the court members.<sup>336</sup>

### ***G. SENTENCING 1980-1984: MANUAL AMENDMENTS AND CHANGES IN THE COURT OF MILITARY APPEALS***

#### ***1. Manual Changes.***

The 1981 amendments to paragraph 75 of the 1969 Manual introduced some significant changes to sentencing procedure. For

<sup>332</sup>22 C.M.A. 321, 46 C.M.R. 321 (1973).

<sup>333</sup>*United States v. Konarski*, 8 M.J. 146, 147 (C.M.A. 1979).

<sup>334</sup>*Id.* at 148.

<sup>335</sup>MCM, 1969, para. 75.

<sup>336</sup>*United States v. Lamela*, 7 M.J. 277, 279 (C.M.A. 1979).

the first time, paragraph 75 permitted the government to benefit from the relaxed rules of evidence, albeit only when it rebutted the defense extenuation and mitigation evidence.<sup>337</sup> Use of the relaxed procedures was still a matter for the discretion of the military judge, and could include use of letters, affidavits, certificates, and other writings.<sup>338</sup> Aggravation evidence still required a full adversarial hearing, with essentially the same rules of evidence as the trial on the merits.<sup>339</sup>

Rules governing the introduction of personal data, evidence of the character of the accused's prior service, and prior convictions were not substantially altered. Paragraph 75b(2) did attempt to limit the objections to data from the accused's personnel records to grounds of inaccuracy, incompleteness in a specific respect, or containing data not admissible under the Military Rules of Evidence, as applied to sentencing.<sup>340</sup> The conviction rules were expanded to encompass civil convictions, subject to the same six-year limitation applied to military convictions. The rules of finality in the jurisdiction in which the conviction was had would determine admissibility in courts-martial.<sup>341</sup>

The standards for production of sentencing witnesses were tightened.<sup>342</sup> Given the latitude to introduce nontestimonial evidence on extenuation, mitigation, and in rebuttal, the application of standards different from those governing witness production for the merits of the case was reasonable.<sup>343</sup>

## 2. *Changes in the Court.*

Robinson O. Everett became the Chief Judge of the Court of Military Appeals in April, 1980, replacing Judge Fletcher, who remained on the Court. While Chief Judge Everett shared Judge Fletcher's interest in the presentence investigative report as a model for military sentencing practice, he did not share Judge

<sup>337</sup>MCM, 1969, para. 75d, as amended by Executive Order 12315, 3 C.F.R. 163 (1982) [hereinafter MCM, 1969, as amended, 1981].

<sup>338</sup>*Id.* at para. 75c(3).

<sup>339</sup>*Id.* at para. 75b(4). Written or oral depositions were made admissible in aggravation.

<sup>340</sup>The meaning of this last clause is not clear. Mil. R. Evid. 1101(c) permits the rules to be relaxed as provided in para. 75 of the MCM, or as otherwise provided in the Manual. Paragraph 75 points to no specific provision of the rules of evidence dealing with sentencing. Perhaps the provision was purposefully vague, to permit the appellate courts to structure different applications of the new rules of evidence of sentencing.

<sup>341</sup>MCM, 1969, as amended, 1981, para. 75c.

<sup>342</sup>*Id.* at para. 75e.

<sup>343</sup>There is no sixth amendment right to confront of witnesses in the sentencing phase of a criminal trial. *Williams v. New York*, 337 U.S. 241, 245 (1949).

Fletcher's bias against sentencing evidence adverse to the accused. Within two years, the two major sentencing decisions of the Fletcher court would either be reversed, or extensively modified.

### 3. *Government Sentencing Evidence.*

The new Chief Judge took a position diametrically opposed to that of his predecessor on the admissibility of nonjudicial punishment and summary court-martial records. While indicating that he felt *Booker* had been wrongly decided, but that stare decisis dictated it nonetheless be followed, he broadly interpreted its requirements.<sup>344</sup> *United States v. Mack*, handed down only a few months after Judge Everett's arrival on the court, held admissible records of nonjudicial punishment which showed the accused had access to counsel before deciding whether to accept proceedings under Article 15.<sup>345</sup> In contrast to Judge Fletcher's distrust of the Article 15 process,<sup>346</sup> Judge Everett exhibited strong support for consideration of these records in sentencing:

[T]he records of nonjudicial punishment clearly fall within the wide ambit of the sources of information that may be considered by a judge in sentencing—especially since the accused has full opportunity to question the record and to explain or deny the conduct referred to therein. . . . [it] indicates what rehabilitation measures have been previously applied. . . . a sentencing authority is fully entitled to consider the success or lack of success of prior punishments in determining what sentence may be appropriate for any offense for which an accused is to be sentenced.<sup>347</sup>

Judge Everett, however, had serious reservations about the military judge conducting any inquiry of the accused to sustain the admissibility of evidence adverse to the accused.<sup>348</sup> He concurred in a case in which the trial judge had conducted such an inquiry,<sup>349</sup> but only on the grounds that a guilty plea had

<sup>344</sup>*United States v. Mack*, 9 M.J. 300 (C.M.A. 1980).

<sup>345</sup>*Id.* at 322.

<sup>346</sup>*Id.* at 330 (Fletcher, J., dissenting). Judge Fletcher cited a General Accounting Office report highly critical of the nonjudicial punishment process in the armed forces.

<sup>347</sup>*Id.* at 319.

<sup>348</sup>This type of inquiry was upheld in *United States v. Mathews*, 6 M.J. 357 (C.M.A. 1979). *Mathews* was later overruled. *United States v. Sauer*, 15 M.J. 113 (C.M.A. 1983).

<sup>349</sup>10 M.J. 7, 10 (C.M.A. 1980) (Everett, C.J., concurring in the result).

waived the accused's fifth amendment rights.<sup>350</sup>

After the obfuscation of *Booker*, the Everett court was a refreshing change. Shortly after deciding *Mack*, the court handed down a series of decisions explaining exactly what deficiencies in a record of nonjudicial punishment would render that record inadmissible.<sup>351</sup>

Judge Everett's opinion on the so-called "*Booker* inquiry" eventually became the law.<sup>352</sup> Relying on the opinion of the Supreme Court in *Estelle v. Smith*,<sup>353</sup> the court held: "The salutary principle that a sentencing authority should be provided with as much information as possible for consideration in imposing an appropriate sentence does not in itself afford a legal basis for compelling an accused to provide information which will increase his sentence."<sup>354</sup> Judge Fletcher dissented. While some language in *Estelle v. Smith* did indicate that constitutional protections against self-incrimination apply in sentencing, Judge Fletcher may have had the better view of its applicability to

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<sup>350</sup>Judge Everett later changed his opinion that a guilty plea waived the accused's rights against self-incrimination sufficiently to justify this sentencing inquiry. In *United States v. Nichols*, 13 M.J. 154 (C.M.A. 1982), he ruled that a guilty plea waived only the accused's right to refuse to submit to questioning about the offense to which he had entered such a plea, and not as to any prior offenses.

<sup>351</sup>*United States v. Carmans*, 10 M.J. 50 (C.M.A. 1980) (missing signature in block indicating the accused had seen the action taken on his appeal of punishment does not render the record inadmissible); *United States v. Blair*, 10 M.J. 54 (C.M.A. 1980) (omission of the time period in the appellate advice portion of the document does not render it inadmissible); *United States v. Covington*, 10 M.J. 64 (C.M.A. 1980) (form showing vacation of a punishment previously suspended need not show what process the accused was given in the vacation proceeding; a presumption of validity renders it admissible); *United States v. Burl*, 10 M.J. 48 (C.M.A. 1980) (when the form reflected that the accused had appealed the Article 15, but did not disclose the appellate action taken it was inadmissible); *United States v. Guerrero*, 10 M.J. 52 (C.M.A. 1980) (when portion of the form showing the accused where to go for advice is left blank, the form is inadmissible); *United States v. Cross*, 10 M.J. 34 (C.M.A. 1980) (indiscernible signature on the portion of the form indicating the accused consented to the Article 15 procedure renders the form inadmissible). In less than two months, the Everett court provided more guidance on exactly what *Booker* required than the Fletcher court had in three years. Further guidance (and further emasculation of *Booker*) came in 1984. See *United States v. Alsup*, 17 M.J. 166, 170 (C.M.A. 1984) (telling the accused he had the right to counsel at a summary court-martial was sufficient to meet the requirement that the accused be told he had the right to consult counsel prior to accepting trial by summary court-martial) and *United States v. Wheaton*, 18 M.J. 159 (C.M.A. 1984) (form was silent on whether accused had decided to see an attorney or whether he had decided to accept nonjudicial punishment; the court could infer that the accused did not exercise his right to refuse).

<sup>352</sup>*United States v. Sauer*, 15 M.J. 113 (C.M.A. 1983).

<sup>353</sup>451 U.S. 454 (1970).

<sup>354</sup>*Sauer*, 15 M.J. at 116-117 (citations omitted).

military sentencing practices. *Estelle v. Smith* was a capital case, and the Supreme Court has recently applied more stringent requirements to sentencing evidence in capital cases.<sup>355</sup> There has been no major change in the federal presentence investigative report since *Estelle v. Smith*; the probation officer and the sentencing judge rely heavily on information obtained from the accused, although the information is not usually obtained in open court.<sup>356</sup> There is a distinction, however, between a trial judge compelling an accused to provide information and the voluntary process for obtaining it used in preparation of the presentence report. Since the latter process is still used in the federal system, apparently either *Estelle v. Smith* applies only in sentencing in capital cases, or only to compelled disclosures.<sup>357</sup>

Prior to the 1981 Manual amendments specifically authorizing admission of civilian convictions, the court had countenanced their consideration when the conviction was documented in the accused's personnel records. Judge Everett noted that such evidence helped to determine rehabilitative potential and saw no policy reason to exclude a conviction simply because of its civilian nature.<sup>358</sup> The Manual change actually worked to the prosecution's detriment, for it applied to civil convictions the same restrictive rules of admissibility that govern military convictions. In *United States v. Krewson*,<sup>359</sup> the trial counsel introduced a portion of the accused's personnel records which reflected a civil conviction for a similar offense, assault with intent to commit rape. The civilian offense had been committed after the court-martial offense, which under the rules applied to military convictions rendered it inadmissible.<sup>360</sup> The Army Court of Military

<sup>355</sup>Compare *Williams v. New York*, 337 U.S. 241 (1949) (no due process right to disclosure of evidence the sentencing judge relied on in imposing sentence) with *Gardner v. Florida*, 430 U.S. 349 (1977) (in death cases, defendant must be given opportunity to see information in the presentence investigation, absent a showing of good cause).

<sup>356</sup>See Presentence Inves. Rep., *supra* note 16, at 3-4, 10. The probation officer is directed to conduct more than one interview with the defendant when possible. Cf. Evjer, *Some Guidelines in Preparing Presentence Investigative Reports*, 37 F.R.D. 111, 180 (1965). The sentencing judge may address the defendant and seek clarification of any matter contained in the report.

<sup>357</sup>Had Smith been compelled against his will to submit to an interview with the psychiatrist, it would be easy to read the decision in his case as protecting only against such compelled disclosures. The case, however, did not suggest that Smith had to be ordered to cooperate with the court-appointed psychiatrist. The "capital case" distinction is easier to square with the continued federal practice of using information obtained from a criminal defendant to determine his sentence.

<sup>358</sup>*United States v. Cook*, 10 M.J. 138, 140 (1981).

<sup>359</sup>12 M.J. 157 (C.M.A. 1981).

<sup>360</sup>*Id.* MCM, 1969, as amended 1981, para. 75b(3) made admissible only "offenses committed during the six years next preceding the commission of any offense of



Review had held that the military convictions rule was inapplicable, even by analogy, since the conviction was contained in a personnel record which was otherwise admissible.<sup>361</sup> The Court of Military Appeals disagreed. Characterizing this as an attempt to "backdoor" the use of an otherwise inadmissible conviction, the court held that evidence of prior civilian convictions had to comply with the rules restricting the use of military convictions, even if they were properly included in the accused's personnel records.<sup>362</sup> The nature of the evidence, not its location, would control. The court's reliance on the rules governing use of convictions was misplaced, since at the time the record was introduced, the convictions rules applied only to court-martial convictions,<sup>363</sup> and the manual allowed other evidence of subsequent misconduct.<sup>364</sup> Perhaps, without directly saying so, the court was simply troubled by the fact that the two offenses were so similar that they were concerned about the prejudicial impact on the accused's sentence.

Concern over the "back-door" use of sentencing information which was otherwise inadmissible led to the decision in *United States v. Brown*.<sup>365</sup> A record of nonjudicial punishment too old to be properly filed in the accused's personnel records was included in a bar to reenlistment, as one of the supporting documents; the bar to reenlistment was then properly filed in the accused's personnel records.<sup>366</sup> It was error, the court held, not to redact the inadmissible Article 15 before introducing the bar packet.<sup>367</sup> Judge Cook dissented on the basis that the entire bar to enlistment packet was admissible under both the Manual and regulations.<sup>368</sup> While the court's opinion was unduly technical, the real problem was the competing considerations which led to the restrictive rules in the Army regulation governing records of nonjudicial punishment.<sup>369</sup> Concern over unduly stigmatizing an

which the accused had been found guilty." (emphasis added).

<sup>361</sup>8 M.J. 663, 665 (A.C.M.R. 1979).

<sup>362</sup>12 M.J. at 160.

<sup>363</sup>The Army Court of Military Review opinion in *Krewson* was handed down in 1979; paragraph 75b(3) was not amended to allow civilian convictions to be considered as convictions (rather than reflective of the past conduct of the accused) until 1981.

<sup>364</sup>*Krewson*, 8 M.J. at 666.

<sup>365</sup>11 M.J. 263 (C.M.A. 1981).

<sup>366</sup>*Id.* at 265.

<sup>367</sup>*Id.* AR 27-10, para. 3-15c (C20 15 Aug. 1980) required records of nonjudicial punishment to be removed from the soldier's personnel records when more than two years had elapsed since imposition of punishment.

<sup>368</sup>11 M.J. at 267 (Cook, J., dissenting).

<sup>369</sup>AR 27-10, para. 3-15c (C20 15 Aug. 1980).

offender led to a two-year limitation on maintaining records in the personnel file; yet the rule mandating their removal at the end of this period meant that the sentencing authority at courts-martial might take a sentencing decision based on a distorted picture of the accused's prior disciplinary record.

The court's preoccupation with the prejudicial impact of sentencing information adverse to an accused did not end with Judge Everett's arrival on the court. In *United States v. Boles*,<sup>370</sup> an opinion written by Judge Fletcher, the court held that not all evidence of the accused's prior misconduct contained in his personnel records was admissible, despite provisions of the Manual to the contrary.<sup>371</sup> Although an administrative letter of reprimand, which included a civilian police report, comported with Air Force regulations permitting it to be filed in the accused's personnel files, the court held the letter to be inadmissible. Without any support from the Manual, the court ruled that paragraph 75d did not encompass letters of reprimand which, as Judge Fletcher characterized it, were not prepared to correct or reprove, but rather with an eye toward aggravating a court-martial sentence.<sup>372</sup> Judge Fletcher noted that the military sentencing rules were not as broad as those in federal court, and suggested that sentencing by members was one reason.<sup>373</sup> Judge Fletcher was perhaps again attempting to change aspects of the military justice system by changing the rules of admissibility of evidence on sentencing. It had worked to some extent in *Booker* to change the nonjudicial punishment process; his carrot and stick approach might now work to abolish sentencing by members. What is curious is that the Chief Judge concurred in the opinion. In *Mack*, he had expressed confidence that members could give due consideration to records of uncharged misconduct, if properly guided by the military judge.<sup>374</sup> Judge Cook dissented in *Boles*, on the basis that the Manual permitted consideration of such material, once it was properly filed.<sup>375</sup>

One of the most disturbing sentencing opinions to come out of the Everett court was *United States v. Morgan*.<sup>376</sup> Aware that the trial counsel could rebut favorable information in the accused's personnel records, the defense counsel moved to have the trial

<sup>370</sup>11 M.J. 195 (C.M.A. 1981).

<sup>371</sup>*Id.* at 198-199.

<sup>372</sup>*Id.*

<sup>373</sup>*Id.* at 198 n.5.

<sup>374</sup>9 M.J. at 319.

<sup>375</sup>11 M.J. at 202-07 (Cook, J., dissenting).

<sup>376</sup>15 M.J. 128 (C.M.A. 1983).

counsel introduce the accused's entire personnel record, instead of offering only selected documents from it. The defense counsel was quite candid about his reasons; if the trial counsel were forced to offer the entire file, he could not rebut the favorable documents with unfavorable testimony.<sup>377</sup> Holding that the accused's personnel records were really one document, and that a rule of completeness required the introduction of the entire file upon defense counsel's objection, the court found error in the military judge's decision to allow the trial counsel first to offer the entire file, but then to rebut any favorable information contained in it.<sup>378</sup> Judge Everett favored the presentence report and considered the personnel records of the accused analogous to one; *Morgan* was an attempt to turn the personnel records into such a report and force the trial counsel to introduce it<sup>379</sup> by the expedient of treating the records as "an entity" for purposes of applying the rule of completeness.

Judge Cook concurred in the result. Expressing his reservation about applying the rule of completeness to personnel records, he noted that the Manual contemplated an adversarial sentencing process.<sup>380</sup> He questioned the wisdom of this approach, as it would reduce the information available on sentencing:

By forcing the trial counsel to introduce the "complete military personnel records" of the accused, if he choses to introduce any military personnel records at all, the

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<sup>377</sup>*Id.* at 130. The government can offer rebuttal evidence only if the defense presents extenuation and mitigation evidence. *Id.* at 134.

<sup>378</sup>*Id.* at 134.

<sup>379</sup>Judge Everett apparently felt introduction of the entire personnel file would give the sentencing agency a better picture of the accused:

In some ways the presentation of the accused's personnel records to the sentencing authority pursuant to paragraph 75d is analogous to presenting the report of presentence investigation to a Federal district judge pursuant to Fed. R. Crim. P. 32(c). Indeed, sometimes an accused's military personnel records may prove more comprehensive and more helpful to the military judge or court members in determining an appropriate sentence than a report of presentence investigation would be in a Federal district court.

*Id.* at 131. He also cited the ABA Standards for Criminal Justice, the Prosecution Function, as support for the proposition that the trial counsel should introduce the entire file, since those standards required the prosecutor to disclose all relevant sentencing information to the court. *Id.* at 132. There is a difference between disclosure requirements and a rule requiring the government to "vouch" for such evidence. A voucher rule could be fairly implied, for the *Morgan* decision indicated the military judge had erred in ruling that he would permit the government to rebut any evidence that the trial counsel was compelled to offer from the accused's personnel records.

<sup>380</sup>15 M.J. at 137. He also noted that the provision of AR 27-10 that the court relied upon had been changed by the time the decision in *Morgan* was handed down. *Id.* at 135.

majority places a block on the acquisition of evidence giving a complete picture of the accused's "past conduct and performance." For, if the complete MPRJ contains an incomplete, inaccurate, or outdated portrait of the accused, the trial counsel must either forgo introduction of it or present it in that condition without the possibility of rebutting it. Surely, this dilemma was not intended by paragraph 75 of the 1969 Manual, *supra*, certainly it defeats the purpose of the rule of completeness.<sup>381</sup>

While application of the *Morgan* rule could conceivably push the armed forces toward development of a presentence report, it would do so at the expense of valuable sentencing evidence in the interim. Government rebuttal of evidence in the personnel records would not be possible, thus eliminating one potential source of valuable sentencing information. Since the court left the armed forces a way out—amendment of the Manual—the change to a presentence report was not a likely result.<sup>382</sup> Why, then, did the court so contort the rule of completeness to achieve this result? At the time of the decision, extensive revisions of the UCMJ and the Manual were underway. Perhaps the court was trying to influence the direction of those revisions.

#### 4. Sentencing Argument.

Judge Cook's brief war on general deterrence as a consideration for sentencing suffered a major defeat after Chief Judge Everett's arrival on the bench. Already aware that his opinion in *Mosely* was not popular with the court,<sup>383</sup> Judge Cook acquiesced in his own defeat. In *United States v. Lania*,<sup>384</sup> the court accepted anew the concept of general deterrence as a valid sentencing consideration, noting the "near unanimity of views among federal and state sentencing authorities. . . ."<sup>385</sup> Judge Cook concurred in the

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<sup>381</sup>*Morgan*, 15 M.J. at 137 (Cook, J., concurring).

<sup>382</sup>The court commented: "By changing the Manual for Courts-Martial, the President is free to revise sentencing procedures which he determines do not lead to adjudging appropriate sentences." *Id.* at 134-135 & n.8.

<sup>383</sup>See *United States v. Mourer*, 8 M.J. 258 (C.M.A. 1980), in which Judge Cook noted that the issue had divided the court.

<sup>384</sup>9 M.J. 100 (1980).

<sup>385</sup>*Id.* at 103. General deterrence was not an important enough sentencing consideration to prevent the reversal of a deceased accused's conviction, when the case was still on appeal at the time of his death. *United States v. Kuskie*, 11 M.J. 253, 255 (C.M.A. 1981). *Lania* did not put an end to the issue of exclusive reliance on general deterrence as a reason for sentencing. In *United States v. Geidl*, 10 M.J. 168 (C.M.A. 1981), the court found an argument on general and individual deterrence "borderline," but not reversible error, thus intimating that overreliance on general deterrence could still be error.

result. While maintaining his belief that military practice was different, he concluded that further objection to general deterrence arguments was futile.<sup>386</sup>

Other sentencing arguments also received favorable treatment from the Everett court. The trial counsel's reference to an accused's unsworn statement by pointing out that the accused had not testified under oath was "fair prosecutorial comment."<sup>387</sup> The federal rule permitting the sentencing judge to consider the accused's mendacity as a factor bearing on his potential for rehabilitation<sup>388</sup> was adopted in the military, with the added requirement that the trial judge provide adequate instructions to the members delineating the purpose for which such evidence could be considered.<sup>389</sup>

### 5. Sentencing Post-trial.

The limitations on the contents of post-trial reviews did not change under the Everett court. Requiring an opportunity for the defense to respond to unfavorable information, and a general distrust of the use of the review to convey unfavorable information were trends that continued. Oral supplementation of information in the post-trial review required the defense be given a right of response.<sup>390</sup> Evidence that the accused desired a discharge because he felt he had been unfairly treated could not be included in a post-trial review,<sup>391</sup> but "almost any other information favorable to the accused" could be considered in the convening authority's clemency decision.<sup>392</sup>

### 6. Aggravation.

The scope of aggravation evidence was greatly expanded by the Everett court. Although the Manual provision on aggravation evidence seemed to indicate that it could only be introduced in a

<sup>386</sup>*Id.* at 105. (Cook, J., concurring in the result).

<sup>387</sup>*United States v. Breese*, 11 M.J. 17, 24 (C.M.A. 1981).

<sup>388</sup>*United States v. Grayson*, 438 U.S. 41, 50 (1978).

<sup>389</sup>*United States v. Warren*, 13 M.J. 278, 285 (C.M.A. 1982).

<sup>390</sup>*United States v. Dawson*, 10 M.J. 142 (C.M.A. 1981).

<sup>391</sup>*United States v. Moles*, 10 M.J. 154 (C.M.A. 1981). The information was obtained from a form the accused was asked to complete to aid the Secretary of the Navy in making clemency decisions. The information the accused provided made it clear he did not understand that his sentence had not yet been approved. The court noted that there was no evidence the accused had the advice of counsel before completing the form. *Id.* at 156. The court stopped short, once again, of saying that the convening authority could not consider such information, holding only that the information could not be part of the post-trial review. *Id.* at 158.

<sup>392</sup>*United States v. Carr*, 18 M.J. 297 (C.M.A. 1984) (emphasis added). The decision concerned the propriety of providing evidence of an exculpatory polygraph examination to the convening authority.

guilty plea case, and a number of decisions had so held,<sup>393</sup> the illogic of this position did not escape either the Court of Military Appeals or the Navy Court of Military Review. A plea of not guilty could prevent a great deal of aggravation evidence from reaching the court. In a rape case, for example, evidence that the victim suffered from rape trauma syndrome would rebut a defense of consent. If the defense were one of mistaken identity, the evidence would not be admissible, since it did not go to prove any disputed fact. The evidence could not be introduced in sentencing, although relevant to a retribution theory of punishment, since aggravation evidence was barred by the accused's not guilty plea. This anomolous result ended in *United States v. Vickers*.<sup>394</sup> Upholding the Navy court's decision that such evidence was highly relevant to the determination of an appropriate sentence,<sup>395</sup> the court concluded that, because the Manual did not prohibit consideration of aggravation evidence in not guilty plea cases, its relevance dictated its admissibility. Over a century of history to the contrary did not stand in the court's way. The court evidently considered victim impact evidence highly relevant in sentencing.<sup>396</sup> The issue of whether aggravation evidence had to be evidence which could have been introduced during the merits was considered in *United States v. Hammond*.<sup>397</sup> The court noted that paragraph 75b(4) of the Manual seemed to contemplate that aggravation evidence would be of the type admissible in a trial on the merits.<sup>398</sup> The court concluded that the Military Rules of Evidence made relevant information which could help the jury understand the evidence, and that therefore, an expert witness could testify during the sentencing proceedings about the effects of rape on women.<sup>399</sup>

### 7. Rebuttal

Prosecution rebuttal evidence did not fare so well under the Everett court, however. Following Supreme Court precedents,<sup>400</sup>

<sup>393</sup>See, e.g., *United States v. Taliaferro*, 2 M.J. 397 (A.C.M.R. 1975).

<sup>394</sup>13 M.J. 403 (C.M.A. 1982).

<sup>395</sup>10 M.J. 839 (N.M.C.M.R. 1981).

<sup>396</sup>See, e.g., *United States v. Marshall*, 14 M.J. 157 (C.M.A. 1982) (victim permitted to testify after findings in a not guilty plea case as to the changes in her life after the rape).

<sup>397</sup>17 M.J. 218 (C.M.A. 1984).

<sup>398</sup>*Id.* at 219.

<sup>399</sup>*Id.* at 219-220. The witness had never examined the victim in the case. *Cf. United States v. Snipes*, 18 M.J. 172 (C.M.A. 1984) (testimony on the merits about the effects of sexual abuse on children could help the trier of fact understand the offense).

<sup>400</sup>*Middendorf v. Henry*, 425 U.S. 25 (1976), had held that summary courts-martial were not criminal trials.



the Court of Military Appeals ruled that an accused's testimony could not be impeached with a summary court-martial conviction.<sup>401</sup> The use of uncharged misconduct to cross-examine a defense sentencing witness was also restricted.<sup>402</sup>

Two decisions ostensibly favoring government rebuttal evidence portended further restrictions. In *United States v. Donnelly*,<sup>403</sup> the court found no prejudicial error when the trial counsel questioned a defense character witness about related misconduct to show the witness's lack of familiarity with the accused's offense.<sup>404</sup> The court noted the case was tried before a military judge alone,<sup>405</sup> and suggested that a different result might obtain in a trial with members. The Chief Judge concurred in the result, finding error, but no prejudice.<sup>406</sup> In *United States v. Strong*,<sup>407</sup> the trial counsel cross-examined a defense witness, who had testified about the accused's good duty performance and leadership ability, about an Article 15 the accused had received during the same time frame. The Article 15 form itself was inadmissible at trial.<sup>408</sup> Judge Cook wrote for the majority: "There is a substantial difference between the sort of evidence which may be introduced by the trial counsel under paragraph 75b and that which may be used as proper rebuttal under paragraph 75d."<sup>409</sup> While the decisions are favorable to the use of such rebuttal, the circumstances are not. The Chief Judge found error in both *Donnelly* and *Strong*.<sup>410</sup> He evidently favored a very technical approach to rebuttal; if the evidence is not otherwise admissible,

<sup>401</sup>*United States v. Cofield*, 11 M.J. 422 (C.M.A. 1981).

<sup>402</sup>*United States v. Gambini*, 13 M.J. 423 (C.M.A. 1982). On direct examination by the defense counsel, an O.S.I. agent testified that the accused had cooperated with a drug investigation. On cross-examination, the trial counsel attempted to elicit information about the scope of the accused's drug involvement and his subsequent refusal to cooperate in the investigation of others. The court acknowledged the relevancy of the information to the sentencing decision, but held that "relevancy of such evidence is not enough to insure its admission at court-martial." *Id.* at 429. Evidence of uncharged misconduct must be relevant to something other than the disposition of the accused. *Id.* The court ignored completely the clear import of the defense examination—that the accused was a one-time offender who had fully cooperated with authorities. See also *United States v. McGill*, 15 M.J. 242 (C.M.A. 1983) (error to permit rebuttal of the accused's unsworn statement that he'd had a good career and had never been convicted of a crime with testimony about the accused's previous Article 15, which was inadmissible due to an illegible signature).

<sup>403</sup>13 M.J. 79 (C.M.A. 1982).

<sup>404</sup>*Id.* at 82.

<sup>405</sup>*Id.*

<sup>406</sup>*Id.*

<sup>407</sup>17 M.J. 263 (C.M.A. 1984).

<sup>408</sup>*Id.* at 265.

<sup>409</sup>*Id.* at 266.

<sup>410</sup>13 M.J. at 84 (error, but no prejudice); 17 M.J. at 267.

its use in rebuttal is error. Since both Judge Cook and Judge Fletcher would shortly leave the court, the minority opinion was in a good position to become the law.<sup>411</sup>

### ***H. SENTENCING UNDER THE MCM, 1984 AND MORE CHANGES IN THE COURT OF MILITARY APPEALS***

The 1984 Manual for Courts-Martial became effective 1 August 1984. An extensive revision of the 1969 Manual in both content and format, the Manual made several changes in sentencing. Perhaps more significant, though, are the changes *not* made in either the Manual or the UCMJ. Despite extensive debate on the subject, the accused's option to be sentenced by members was retained in the Military Justice Act of 1983.<sup>412</sup> Continuing the past practice, military judges would have the power only to recommend suspension of sentences, not the power to suspend them. Due to the controversy generated by these issues and other provisions, the Military Justice Act of 1983 directed that an advisory commission be appointed to conduct further study.<sup>413</sup> While the Advisory Commission Report was issued on 14 December 1984, no action has yet been taken on its recommendations. Changes to current sentencing practices were not recommended in the Report.<sup>414</sup>

Some of the Manual changes were very favorable to the prosecution. Paragraph 75 of the 1969 Manual was replaced by R.C.M. 1001, which, like previous Manual revisions, expanded the evidence available to the sentencing agency. The change with the biggest potential effect on sentencing and sentences was R.C.M. 1001(b)(5). It shifted to the prosecution the "first bite" at the issue of the accused's potential for rehabilitation. Instead of waiting patiently for an accused to open the door to rebuttal, the government could present opinion evidence in its sentencing case in chief of the accused's potential for rehabilitation. The defense could no longer control the introduction of rehabilitation evidence.

<sup>411</sup>Both Judge Cook and Judge Fletcher retired for medical reasons.

<sup>412</sup>Pub. L. No. 98-209, 97 Stat. 1393 (1983).

<sup>413</sup>Pub. L. No. 98-209, 98 Stat. at 1404-1405. The Advisory Committee was directed to study sentencing by military judge only, giving suspension power to military judges, whether the jurisdiction of the special court-martial should be expanded, whether military judges should be given tenure, and the retirement system of the Court of Military Appeals.

<sup>414</sup>1 Adv. Comm. Rep., *supra* note 15, at 4-7. Some of the members of the Commission issued minority reports recommending adoption of sentencing only by military judge, and permitting the military judge to suspend a sentence.

To that extent, the new Manual made sentencing less of a defense show.<sup>415</sup>

There were limitations, however, on the prosecution's use of rehabilitation evidence in its sentencing case-in-chief. Only opinions were admissible. Relevant, specific acts could be the subject of cross-examination, however. While the new rule apparently contemplated that this evidence would typically be from the accused's chain of command, the rule leaves open the possibility of using experts to discuss the recidivistic tendencies of a particular accused<sup>416</sup> or even of a particular class of criminals, such as pedophiles.<sup>417</sup>

Some of the illogical rules on prior convictions were changed. The six-year rule was eliminated, as was the rule that most convictions be final.<sup>418</sup> Convictions by summary court-martial and special court-martial without a military judge are not admissible until completion of supervisory review.

The new Manual attempted to overrule *Morgan*. It changed the prior rule on admission of the accused's personnel records to reflect that the accused could object to a particular document as incomplete, but could not force the trial counsel to introduce the entire personnel file.<sup>419</sup> In spite of language in *Morgan* which indicated that the Court of Military Appeals would accept a change to the Manual overruling its decision, *Morgan* has not died easily. In *United States v. Salgado-Agosto*,<sup>420</sup> a per curiam

<sup>415</sup>MCM, 1984, R.C.M. 1001(b)(5) analysis indicates that the purpose of the revision was to permit presentation of more complete evidence about the accused to the sentencing agency, without premising it on the defense's decision to offer such evidence as part of its sentencing case.

<sup>416</sup>In *United States v. Konarski*, 8 M.J. 146 (1979), the government had used experts to rebut defense evidence that the accused no longer needed to be incarcerated.

<sup>417</sup>In a child molesting case, *United States v. Garcia*, 18 M.J. 716 (A.F.C.M.R. 1984) an expert witness testified about the recidivism rates for untreated pedophiles, but did not relate his testimony specifically to the accused's recidivistic potential. There was no defense objection to the testimony. The issue on appeal was ineffective assistance of counsel, rather than the admissibility of this type of testimony.

<sup>418</sup>R.C.M. 1001(b)(3). The heading to the rule characterizes it as dealing with "prior" convictions, but the rule itself does not mention timing as a factor in admissibility. The *Krewson* decision is not mentioned in either the discussion or the analysis of the rule; whether previous convictions for offenses committed subsequent to those at issue in the court-martial are admissible is an open question. The pendency of an appeal is a factor which may affect weight, but not admissibility of a conviction, military or civil.

<sup>419</sup>R.C.M. 1001(b)(2). See MCM, 1984, R.C.M. 1001 analysis.

<sup>420</sup>20 M.J. 238 (C.M.A. 1985).

decision,<sup>421</sup> the Court of Military Appeals indicated that Military Rule of Evidence 106's rule of completeness still controls, notwithstanding other changes to Army regulations or the Manual.<sup>422</sup> Further efforts to eliminate the gamesmanship of the *Morgan* rule may well be necessary; perhaps the language of R.C.M. 1001(b)(2) was not clear enough for the court.

The rules on aggravation evidence were modified to conform with *Vickers*. The analysis to the new rule explains that aggravation evidence applies only to the facts and circumstances surrounding the offense. Aggravating facts in the accused's background were not included. Whether the evidence would be admissible in a trial on the merits does not control.<sup>423</sup> The discussion following the rule focuses on victim impact evidence, to include financial, social, psychological, or medical impact; it also includes evidence of "significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense."<sup>424</sup> Why the qualifiers were placed on the showing of institutional harm is not clear. The drafters may have been concerned about overzealous trial counsel introducing evidence too remote to be of much probative value.

The rule lists several additional factors the court may consider on sentencing: the mitigating factor of a guilty plea and evidence properly introduced on the findings, to include evidence of mental impairment of the accused and uncharged misconduct.<sup>425</sup> The phrasing of the provisions on uncharged misconduct and mental impairment appear to limit the court only to consideration of such evidence introduced on the merits, and not to provide an independent basis on which to introduce the evidence. Clearly, mental impairment of the accused is an extenuating or mitigating factor, and the rule should not be interpreted to prevent consideration of evidence of mental impairment introduced only during the sentencing phase of the trial. Evidence of uncharged misconduct, however, can otherwise be introduced under the sentencing rules as part of the accused's personnel records or as evidence in aggravation if the uncharged misconduct is related to the offense charged. Since specific acts which bear on the accused's potential for rehabilitation are admissible only on

<sup>421</sup>The Chief Judge and a new appointee, Judge Cox, were the only two members of the court at the time.

<sup>422</sup>*Salgado-Agosto*, 20 M.J. at 239.

<sup>423</sup>MCM, 1984, R.C.M. 1001 analysis.

<sup>424</sup>MCM, 1984, R.C.M. 1001(b)(4) discussion.

<sup>425</sup>R.C.M. 1001(f).

cross-examination,<sup>426</sup> other evidence of uncharged misconduct is not likely to be adduced.

In *United States v. Martin*,<sup>427</sup> the court dealt with an issue which had long troubled the courts of review. In a trial on the merits, much evidence of uncharged misconduct becomes relevant, not to prove the accused is a bad person, but to show motive, plan, intent, knowledge, opportunity, or for other reasons.<sup>428</sup> Once an accused pleads guilty, such evidence only shows the accused is a person who should be punished more severely. While recognizing the anomaly of letting the accused's plea dictate the nature of the sentencing evidence, the courts of review had held that, even when part of a stipulation of fact, consideration of uncharged misconduct on sentencing was error.<sup>429</sup> The Court of Military Appeals held that evidence of the accused's bad character was highly relevant to sentence, and the accused could not, by his plea alone, restrict consideration of such evidence:

An appropriate analysis of proffered government evidence on sentence is first to determine if the evidence tends to prove or disprove the existence of a fact or facts permitted by the sentencing rules. . . . If the answer is yes, then is the proffered evidence admissible under either the Military Rules of Evidence or the more relaxed rules for sentencing. In this case, the analysis would lead one to conclude that the confession was relevant to prove lack of mistake or motive or predisposition to commit the alleged offenses and tended to aggravate them.<sup>430</sup>

The balancing test of Military Rule of Evidence 403 would then be used to determine admissibility, although the danger of *unfair* prejudice would seem almost nonexistent in sentencing. Concurring in the result, the Chief Judge apparently would have limited such evidence to that showing the accused's state of mind, which he viewed as an aggravating or mitigating factor.<sup>431</sup>

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<sup>426</sup>R.C.M. 1001(b)(5).

<sup>427</sup>20 M.J. 227 (C.M.A. 1985).

<sup>428</sup>Mil. R. Evid. 404(b).

<sup>429</sup>See, e.g., the lower court's opinion in *Martin*, 17 M.J. 899, 901 (A.F.C.M.R. 1983) ("The accused's motive for committing charged offenses is no more necessary to a determination of his guilt during the merits portion of an uncontested case than it is to a determination of his sentence during its sentencing portion").

<sup>430</sup>*Martin*, 20 M.J. at 230.

<sup>431</sup>*Id.* at 232.

The new Manual permitted trial counsel to argue for a specific sentence, and specified that reference to "generally accepted sentencing philosophies" was not error. The philosophies mentioned as appropriate for argument dovetail with those upon which the members are instructed.<sup>432</sup> The Manual itself does not provide any policy as to what theories or philosophies of sentencing the members should consider in adjudging an appropriate sentence, possibly to avoid any question of unlawful influence on the discretion of the sentencing agency.

The post-trial review was effectively eliminated by the Military Justice Act of 1983.<sup>433</sup> The demise of the post-trial review can be attributed to the restrictions placed on it by the appellate courts, as well as the fact its contents had become a fruitful source for allegations of reversible error. The responsibility for providing the convening authority with clemency information and recommendations shifted to the accused;<sup>434</sup> action cannot be taken on the case until the defense makes submissions or until expiration of the time periods for doing so. The defense may bring errors in the trial to the attention of the convening authority and request relief.<sup>435</sup> Defense omissions rising to the level of ineffective assistance of counsel can result in reversible error.<sup>436</sup>

The new Manual maintains the adversarial system of sentencing. Accepting that decision, there is still considerable room for reform. What are the accepted purposes of sentencing in courts-martial, and are the new rules well suited to achieve those goals? Is the federal model suited to military sentencing? The analysis of R.C.M. 1001 indicates that federal practices can only be used in courts-martial to a limited degree.<sup>437</sup> Is that necessarily true? And if federal practices can be adopted, should they be? The answers to these questions cannot be found without considering just what the federal rules on sentencing, both statutory and judicial, are.

<sup>432</sup>The instructions currently provided are quoted *supra* note 5.

<sup>433</sup>UCMJ art. 60(d). The staff judge advocate makes a formal recommendation to the convening authority on the case, but there is no requirement to summarize evidence. The minimal requirements of the recommendation are found in R.C.M. 1106(d)(3).

<sup>434</sup>UCMJ art. 60(b); R.C.M. 1105.

<sup>435</sup>R.C.M. 1105, 1106.

<sup>436</sup>*See United States v. Davis*, 20 M.J. 1015 (A.C.M.R. 1985) (failure of defense counsel to let the convening authority know of the military judge's recommendation that the bad conduct discharge be suspended was incompetency of counsel).

<sup>437</sup>R.C.M. 1001 appendix.



## V. SENTENCING IN FEDERAL COURTS

### A. CONSTITUTIONAL LIMITATIONS ON SENTENCING EVIDENCE

Aside from the special rules applied to sentencing evidence in capital cases,<sup>438</sup> there are very few constitutional limits on what a judge may consider in imposing sentence. There are no rights of confrontation and cross-examination at the sentencing phase,<sup>439</sup> nor does the defendant have any due process right to compel disclosure of the evidence on which the judge relied.<sup>440</sup> Hearsay evidence may be considered.<sup>441</sup> Sentencing philosophies ranging from general deterrence<sup>442</sup> to rehabilitation<sup>443</sup> have been accepted by federal courts.

What limitations do exist, then? The information upon which the judge relies must be factually accurate.<sup>444</sup> Uncounseled prior convictions may not be considered as *convictions*, but the underlying misconduct may permissibly enter the sentencing

<sup>438</sup>See, e.g., *Estelle v. Smith*, 451 U.S. 454 (1981) (fifth amendment protections apply at penalty stage of a capital trial); *Gardner v. Florida*, 430 U.S. 349 (in capital cases accused must be provided with the information in the presentence report). But see *Williams v. Oklahoma*, 358 U.S. 576 (1959) (court may consider hearsay evidence and accused has no confrontation and cross-examination rights at penalty stage of a capital trial).

<sup>439</sup>*Williams v. New York*, 337 U.S. 241 (1949); *Williams v. Oklahoma*, 358 U.S. 576 (1959); *United States v. Fischer*, 381 F.2d 509 (2d Cir. 1967).

[W]eighted countervailing policies have led the Supreme Court to hold that the constitutional guaranty of . . . [confrontation] has no application at the sentencing stage of a criminal prosecution. . . these policies require that the sentencing judge be free to consider information which would be unobtainable if he were limited only to considering representations made in open court and subject to cross-examination and rebuttal.

*Fischer*, 381 F.2d at 511.

<sup>440</sup>*Williams v. New York*, 337 U.S. at 245.

<sup>441</sup>*United States v. Orozco-Prada*, 732 F.2d 1076 (2d Cir.), cert. denied, 105 S. Ct. 154 (1984). See also *United States v. Wondrack*, 578 F.2d 808 (9th Cir. 1978) (reliable hearsay evidence may be considered).

<sup>442</sup>*Collins v. Frances*, 728 F.2d 1322 (11th Cir.), cert. denied, 105 S. Ct. 361 (1984) (the court may permissibly consider general deterrence without any need for actual proof of such an effect); *Gregg v. Georgia*, 428 U.S. 153 (1976) (general deterrence one of the permissible justifications for the death penalty). But see *United States v. Hansen*, 701 F.2d 1078 (2d Cir. 1983) (a sentence can be enhanced to achieve goals of general deterrence only for conduct for which the defendant was blameworthy) and *United States v. Foss*, 501 F.2d 522, 528 (1974) (general deterrence a permissible sentencing consideration, but cannot be rigidly imposed to produce harsh, mechanistic sentences).

<sup>443</sup>*United States v. Derrick*, 519 F.2d 500 (7th Cir. 1960).

<sup>444</sup>*Townsend v. Burke*, 334 U.S. 736 (1948); *United States v. Lemon* 723 F.2d 922 (D.C. Cir. 1983); *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971).

decision.<sup>445</sup> A defendant may not be penalized for the exercise of a constitutional right,<sup>446</sup> nor may a sentence be enhanced for conduct for which the defendant was not mentally responsible.<sup>447</sup>

The limitations are few, and are based primarily on due process grounds.<sup>448</sup> Any procedure which provides for factually accurate information and limits consideration of the prohibited factors will pass constitutional muster.

## **B. SENTENCING PROCEDURES IN FEDERAL COURTS**

Sentences are rarely imposed immediately after conviction in federal court.<sup>449</sup> A presentence investigative report is normally prepared by the probation service of the court,<sup>450</sup> and encompasses information from a variety of sources (including the defendant) about the offense, the offender, co-defendants, the victim, and the salient factor score, from which the probable time period for custody is predicted.<sup>451</sup> The manual used to guide the probation officer's preparation of the report stresses accuracy, verification of information, and synthesis of the data.<sup>452</sup>

The contents of the report, other than the probation officer's recommendations, are usually disclosed to the defendant,<sup>453</sup> who

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<sup>445</sup>*United States v. Tucker*, 440 U.S. 443, 446 (1972): "[I]n exercising that discretion, . . . [the judge's] relevant inquiry is not whether the defendant has been formally convicted of past crimes, but whether and to what extent the defendant has in fact engaged in criminal or antisocial acts."

<sup>446</sup>A defendant may not be penalized for demanding trial. *United States v. Wiley*, 278 F.2d 500 (7th Cir. 1960). A refusal to admit guilt after conviction, however, may be considered as bearing on the defendant's potential for rehabilitation. *United States v. Long*, 706 F.2d 1044 (9th Cir. 1983). A harsher sentence may not be imposed as a penalty for a successful appeal. *North Carolina v. Pearce*, 395 U.S. 711 (1969). A confession obtained in violation of the fifth amendment may not be considered on sentencing. *Jones v. Cardwell*, 686 F.2d 754 (9th Cir. 1982).

<sup>447</sup>*Hansen*, 701 F.2d at 1083.

<sup>448</sup>A summary of recent cases dealing with limitations on what the sentencing judge may consider can be found in *Project, 14th Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals, 1983-1984*, 73 *Geo. L. J.* 225, 671-707 (1984).

<sup>449</sup>*Fed. R. Crim. P.* 32(a)(1) provides in pertinent part: "Sentence shall be imposed without unreasonable delay." Time to prepare the presentence investigative report is contemplated, however, as the report is not normally completed until three or four weeks after the conviction. *Presentence Inves. Rep.*, *supra* note 16, at 3.

<sup>450</sup>The preparation of a report may be waived by the defendant, with the consent of the court. *Fed. R. Crim. P.* 32(c)(1).

<sup>451</sup>*Presentence Inves. Rep.*, *supra* note 16, at 7-17.

<sup>452</sup>*Id.* at 1-5.

<sup>453</sup>*Fed. R. Crim. P.* 32(c)(3). Exceptions to the disclosure rule are granted only when, in the opinion of the court, the defendant's rehabilitation program might be

must be permitted an opportunity to comment on the report.<sup>454</sup> The Comprehensive Crime Control Act of 1984 requires disclosure at least 10 days before sentencing.<sup>455</sup> In the court's discretion, the defendant may introduce testimony or other evidence to correct factual inaccuracies in the report.<sup>456</sup> Amendments to the Federal Rules of Criminal Procedure which take effect in November, 1986 will require the judge to make a finding as to any controverted matter or to expressly disavow reliance on the controverted matter in sentencing.<sup>457</sup>

The Sentencing Reform Act of 1984 requires the judge to impose a sentence which effectuates the purposes of the Act.<sup>458</sup> Normally, sentences imposed will be within a guideline range to be established by the Sentencing Commission. The judge may sentence outside the sentencing range, but only after finding an aggravating or mitigating factor which was not adequately considered by the Commission when the guidelines were promulgated.<sup>459</sup> The judge must place reasons for the sentence on the record in every case.<sup>460</sup> Until the Act becomes fully effective, a sense of the Senate resolution requests that judges sentence in accordance with the new rules.<sup>461</sup>

### C. CRITICISMS OF THE FEDERAL PROCEDURE

#### 1. Nondisclosure.

Rule 32(c) of the Federal Rules of Criminal Procedure still permits certain portions of the presentence report to be withheld from the accused. Withholding of any data considered by the sentencing agency is a valid grounds for criticism. The accused cannot rebut evidence of which he is unaware. The tradeoff may

disrupted; the information was obtained under a promise of confidentiality; or disclosure might result in harm to the defendant or others. In any event, a summary of the information exempted from disclosure must be provided to the defendant, either orally or in writing.

<sup>454</sup>*Id.*

<sup>455</sup>Fed. R. Crim. P. 32(c), as amended by The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2014-2015.

<sup>456</sup>Fed. R. Crim. P. 32(c)(3).

<sup>457</sup>Fed. R. Crim. P. 32(c)(3)(D), as amended by Pub. L. No. 98-473, 98 Stat. 2014, 2031 (Oct. 12, 1984, effective Nov. 1, 1987).

<sup>458</sup>18 U.S.C. § 3553 (Supp. III 1985). The text of these reasons for sentencing is quoted, *supra* text accompanying note 65.

<sup>459</sup>18 U.S.C. § 3553(b) (Supp. III 1985).

<sup>460</sup>*Id.* at § 3553(c).

<sup>461</sup>The Comprehensive Crime Control Act of 1984, § 239, Pub. L. No. 98-473, 98 Stat. 2039. The resolution is nonbinding.

be a reduction in the evidence available to the judge; if confidential sources cannot be protected, they may dry up. The cases in which sources of information wish to remain anonymous are probably the cases in which the sentencing information is needed most—those involving dangerous offenders. While cognizant of the disadvantages, the Model Act takes the position that total disclosure to the defendant is necessary, although it permits the report to be protected from public disclosure.<sup>462</sup> Section 18-5.4 of the ABA Sentencing Standards follows the federal model by narrowly restricting disclosure. The commentary notes: "No issue in the law of sentencing has attracted the same sustained attention and controversy as that of the defendant's asserted right to disclosure of the presentence report."

Disclosure is not an issue in the current military practice; disclosure is total.<sup>463</sup> Adopting the federal model might result in making more information available to the sentencing agency, but the cost to the accused's rights would be too high. The present military practice of total disclosure should not be modified simply to conform to federal practice. Any incremental increase in the availability of sentencing information conditioned on non-disclosure is outweighed by the unfairness, perceived or actual, of sentencing an accused based on undisclosed evidence.

## 2. *Contents of the Report.*

Much criticism has also been leveled at the content of the presentence report. The criticisms fall into two general categories: problems with the accuracy of the information provided, and the value of the information to the sentencing decision. The *Weston*<sup>464</sup> case illustrates the accuracy problems: The presentence report indicated that Ms. Weston was a major drug dealer who made bi-weekly trips to Latin America, importing large quantities of drugs, and who had refused to assist law enforcement officers in a continuing investigation after her arrest. The defendant denied the allegations that she was a major drug supplier and that she had frequently travelled to Latin America. Before imposing the maximum punishment, the trial judge directed an in camera disclosure of the information upon which the report was based.<sup>465</sup> The appellate court characterized this information as "unsworn evidence detailing otherwise unverified statements of a faceless informer that would not even support a search warrant or an

<sup>462</sup>Model Act, *supra* note 6, § 3-205.

<sup>463</sup>R.C.M. 701 (a)(4)-(6).

<sup>464</sup>*United States v. Weston*, 448 F.2d 626 (9th Cir. 1971).

<sup>465</sup>*Id.* at 628-30.

arrest. . ."<sup>466</sup> Weston was faced with an impossible task: proving that the allegations were untrue. Recognizing this problem, the appellate court provided sentence relief, holding it impermissible to base a sentence on unverified information contested by the defendant. Yet, certain relevant conclusions can be legitimately drawn, even from unverified information. In *United States v. Wondrack*,<sup>467</sup> the defendant filed a late tax return which included \$125,000 in "miscellaneous income." The probation officer who prepared the presentence report concluded the miscellaneous income was from drug trafficking, and that the defendant had used his job as a cargo handler at the airport to assist in drug smuggling.<sup>468</sup> The distinction between the two cases is simply the reliability of the information.

The commentary to ABA Sentencing Standard 18-5.1 provides an extensive analysis of the accuracy problems in presentence investigations. Disclosure is certainly one solution, but not a complete one. When there is simply no basis for the allegations in the report, as in *Weston*, the right of rebuttal is worthless. A second solution is a requirement that probation officers verify the data used in preparing their reports. That is exactly the guidance currently given probation officers in preparing the reports: "Verify the facts contained in the presentence investigation report. . . . Clearly label any unverified information. Immeasurable harm may result from unverified information presented as fact."<sup>469</sup>

A second problem is the nature of the information presented. Although the probation officers who prepare the reports are instructed to be brief, clear, and to report experiences only to the extent they may assist the court in understanding the defendant,<sup>470</sup> the very nature of the report lends itself to becoming anecdotal. A human being is described in the report, not merely one incident in his life. The anecdotal nature of the reports has

<sup>466</sup>*Id.* at 629-631.

<sup>467</sup>578 F.2d 808 (9th Cir. 1978).

<sup>468</sup>*Id.* at 809-10.

<sup>469</sup>Presentence Inves. Rep., *supra* note 16, at 5 (emphasis original). See also O'Donnell, Churgin, & Curtis, *supra* note 57, at 46:

We are mindful of the existing and often unarticulated practice of enhancing a defendant's term of imprisonment on the basis of allegations in the presentence report—often unsubstantiated and not subject to meaningful challenge—that the defendant is involved in organized crime, may have committed crimes for which he was neither charged nor prosecuted, or is considered likely to commit a crime other than the one for which he is being sentenced.

<sup>470</sup>Presentence Inves. Rep., *supra* note 16, at 4.

been a source of criticism. The ABA Sentencing Standards note that the rehabilitative focus of sentencing fostered the belief that the more information available to the sentencing judge, the better.<sup>471</sup> That assumption was challenged in an empirical study by Mr. John Hogarth of the sentencing practices of Canadian magistrates.<sup>472</sup> He concluded that the judge makes up his own mind about a sentence, and uses the presentence report to justify his conclusions.<sup>473</sup> He commented: "The notion that magistrates can sentence better if they know 'all about' offenders has been shown to be a myth."<sup>474</sup>

The accuracy of sentencing information provided the court-martial does not appear to be a problem. The vast majority of challenges to prosecution evidence come in the form of technical evidentiary objections, rather than objections to the accuracy of the data provided. The adversarial nature of the military sentencing hearing has a great deal to do with this difference: government sentencing evidence is available to the accused before the hearing, and any evidence which is inaccurate or untrue will likely be brought to the trial counsel's attention before it is introduced. The critique of the *quantity* of evidence in the presentence report does not apply to the military; the court-martial is hardly inundated with information. Presentation of the data which is available could be enhanced by synthesizing it into a report, but manpower shortages make adoption of anything resembling the presentence investigative report unlikely.<sup>475</sup>

### 3. *Limited Right of Rebuttal*

In comparison to the military sentencing system, the federal model provides only a limited right to rebut inaccurate or untrue information in the presentence report. Under the current federal procedures, the defendant's ability to present evidence to contradict the presentence report is limited by the discretion of the trial judge. That same limitation remains under the changes to Rule 32(c) made by the Comprehensive Crime Control Act of 1984,<sup>476</sup> but the changes do restrict consideration of the controverted

<sup>471</sup>ABA Sentencing Standards, *supra* note 6, commentary to § 18-5.1.

<sup>472</sup>J. Hogarth, *Sentencing as a Human Process* (1971).

<sup>473</sup>*Id.* at 229-231.

<sup>474</sup>*Id.* at 390.

<sup>475</sup>In the Army, at least, the quest is to find enough people to fill the new light divisions. Finding personnel to fill probation officer positions is an unrealistic expectation. The "tooth to tail" ratio (combat soldiers to support personnel) is a matter of some concern. Justifying additional support soldiers (or civilians) would be extremely difficult.

<sup>476</sup>Pub. L. No. 98-473, 98 Stat. 1976 (1984).



material. Since the judge will either have to make a finding as to the controverted matter, or state that he is not considering the matter in imposing sentence, the defendant is more likely to object to questionable matters in the report. Under the new rule, he has a greater chance to prevent consideration of the objectionable material. While there are valid reasons for not turning the sentencing hearing in federal court into a second phase of the trial on the merits,<sup>477</sup> the change to Rule 32(c) portends a move in that direction.

In contrast, the military practice permits the accused practically unlimited rights of rebuttal of prosecution sentencing evidence. The military system is more likely to ensure that only factually accurate information adverse to an accused will be considered.

## VI. CHANGE IN MILITARY SENTENCING PRACTICES

Deficiencies exist within the sentencing system in the military. In contrast with the Model Act, the ABA Sentencing Standards, and the federal code, the military has not statutorily adopted any type of sentencing philosophy. Our judicially-derived emphasis on individualized sentences for rehabilitative purposes runs counter to the state and federal trend away from sentencing for rehabilitation.<sup>478</sup> Our sentencing rules are the result of traditions that have not been closely examined for continuing vitality. They are not designed to complement even those goals for sentencing which have passed judicial scrutiny. The current rules are the result of piecemeal changes to a sentencing process over a century old. This tinkering process has produced a system with rules that frustrate its stated purpose, that are logically inconsistent, and that are subject to skewed interpretations by appellate judges. Some sentencing reform is certainly needed; the question is: What can and should be changed? The proposals for change which follow proceed from two basic assumptions: first, that sentencing by members will be retained;<sup>479</sup> and second, that adoption of the

<sup>477</sup>These reasons are detailed in the ABA Sentencing Standards, commentary to § 18-6.4: cost to the state; extension of the time period between apprehension to disposition; jail over-crowding, providing an incentive to greater use of determinate sentencing; and the balance between the accused's right and those of society weighing more strongly in favor of society at a sentencing proceeding.

<sup>478</sup>See Sentencing Reform in the U.S., *supra* note 9, describing the return to determinate sentencing.

<sup>479</sup>The Advisory Commission Report lists nine factors which justify retaining members sentencing: judges do not sentence any more consistently than members

federal sentencing structure is not feasible, nor appropriate for the military.<sup>480</sup>

Total adoption of the current federal model for sentencing is not feasible, either economically or philosophically. Development of any type of judicially supervised, professionally trained group to conduct presentence investigations and prepare reports would require commitment of already scarce personnel resources. Using existing resources, such as either military police personnel or those from administrative support fields will not provide the independence which characterizes the federal probation officer. Additionally, the federal system has been subjected to considerable criticism. The military would exchange a system which places considerable emphasis on protection of a accused's "rights" for one which is just developing such a concern. One strong point of the federal system, however, is that the information available to the sentencing judge is superior in quantity, and probably in quality, to that available in courts-martial. Unfortunately, the mechanisms for getting that information to the federal judges are inferior to those we presently use, at least in terms of ensuring the information is factually accurate and relevant. Adopting the current federal procedural rules would be a step backward for the accused, although it would streamline the sentencing process.

There are a number of other cogent reasons to avoid wholesale engrafting of Rule 32(c) on the military justice system. The federal model contemplates that a defendant will not be sentenced immediately; a delay to prepare the presentence report and to submit it to the defendant and the prosecution is necessary in most cases. The military system simply cannot afford to have a convicted accused return to the command to await sentence. The potential disruption of morale and discipline in just these circumstances is one reason that the UCMJ provides that a sentence to confinement will be served immediately, while all other punishments are held in abeyance until they are ordered executed by the

do; significant numbers of military members accused of crimes select sentencing by members; sentences handed down by members help to define community norms of punishment and provide needed feedback to judges on the values and needs of the military community; members observe the fundamental fairness of the military justice system firsthand, and carry those observations back to their units; the long tradition of sentencing by members; a potential increase in sentence length if sentencing were done only by judges; judge alone sentencing is not markedly more efficient; there are few differences in what is admissible before judges as contrasted to members; and a circuit-riding judge may be out of touch with the attitudes and concerns of the command. 1 Adv. Comm. Rep., *supra* note 15, at 4-6.

<sup>480</sup>R.C.M. 1001 analysis reaches the same conclusion.

convening authority or an appellate court.<sup>481</sup> Placing everyone convicted of an offense in some sort of confinement to await the presentence report is equally unpalatable. Confinement might never be adjudged at trial, much less approved. Local post detention facilities are often inadequate for anything more than extremely short-term incarceration; transferring the accused to more adequate facilities would hamper preparation of any presentence report, since interviews with the defendant are a major feature of the probation office's method of preparation.

Sentencing in the military justice system serves many purposes which are not factors in the federal system. Certainly protection of society is one of the major concerns of the military system as well as the federal one. The military sentencing authority must consider the impact on military society as well as society at large. With apologies to Judge Cook, there are stronger reasons in the military for general deterrence sentencing than there are in civilian society: the impact of each sentence on good order and discipline must be carefully weighed. In a large city, or large federal judicial division, an unusually light or harsh sentence may not even be noticed. The same cannot be said of a military unit. Returning a convicted soldier to duty may be the most appropriate result in an individual case; the impact, however, of that action on the command is a necessary factor in the calculation of an appropriate sentence. Most federal crimes can be classed as *malum in se*;<sup>482</sup> many military offenses are *malum in se* only in a military context. In a civilian context, they are merely *malum prohibitum*.<sup>483</sup> General deterrence sentencing, or perhaps more appropriately, sentencing for denunciative purposes is necessary to put these punitive articles in the proper focus: walking off the job is no longer an informal way of giving notice; it is a criminal offense, carrying criminal penalties.

The difficulties of applying federal sentencing philosophies to the military justice system have been recognized by Congress; sentencing under the UCMJ is specifically exempted from the

<sup>481</sup>UCMJ art. 57.

<sup>482</sup>M. Fleming, *Of Crimes and Rights* (1978). Fleming defines *malum in se* offenses as "those violations of the natural order which, if unchecked, make it impossible for men to live together . . . intentional invasions of primary personal rights and of operations of public agencies created to protect personal rights, invasions both abhorrent to the moral sense and proscribed by positive law." *Id.* at 43.

<sup>483</sup>Under Fleming's definition, absence without leave, particularly under combat conditions could be viewed as true crime, since it strikes at the operations of a public agency, the armed forces, created to protect personal rights.

application of the new federal sentencing philosophy.<sup>484</sup>

Application of the sentencing guidelines procedure established by the Sentencing Reform Act is simply not practical for the military. The guidelines have uniformity of sentencing as a goal, and are designed to provide data to the sentencing judge on what range of penalties should be imposed for specific crimes, taking into account various mitigating and aggravating factors. The sentence ranges recommended cannot easily be adapted to military needs, since the military system does not have the same penalties available. Creation of guidelines unique to the military would be a time-consuming and cumbersome process. While there are strong reasons for weighing general deterrence more heavily as a sentencing factor in the military, there are equally strong reasons for individualizing sentences as well: we are rarely dealing with hardened criminals; manpower shortages may dictate that sentenced soldiers be returned to duty; we have a correctional system that is capable of retraining selected soldiers for return to duty; and our penal code defines certain acts as criminal offenses which are not criminal in the civilian society.

The UCMJ should follow the federal criminal code in at least one respect, however. It should define the purposes for which a sentence by court-martial may lawfully be imposed. The sentencing guidance given to court members from the Military Judge's Benchbook<sup>485</sup> suffers from two deficiencies: it is not detailed enough to provide the members with sufficient guidance to structure their nearly unfettered discretion,<sup>486</sup> and as a Department of the Army Pamphlet, it can be judicially overruled. Given the Court of Military Appeals' penchant for overruling even Manual provisions designed to provide sentencing guidance,<sup>487</sup> nothing less than a UCMJ change will suffice to ensure that a particular sentencing philosophy will not become heresy with a change in the court. Changes to the UCMJ to provide guidance on why to sentence cannot be viewed as unlawful influence on the members, since the statute would, absent any constitutional

<sup>484</sup>18 U.S.C. § 3551 (Supp. III 1985).

<sup>485</sup>Dept. of Army, Pamphlet No. 27-9, Military Judge's Benchbook para. 2-37, 2-38 (May 1982) (C1, 15 Feb. 1985).

<sup>486</sup>See 1 Adv. Comm. Rep., *supra* note 15, at 117 (transcript of hearings, testimony of Colonel James G. Garner: "[W]e must perhaps do a better job of designing realistic instructions setting forth what are desirable sentencing objectives, get them approved by the court so we don't get reversals, so that we can really give them a more meaningful framework in understanding what are the desirable goals of sentencing." Colonel Garner was responsible for the current Benchbook guidelines).

<sup>487</sup>See, e.g., *United States v. Mamaluy*, 10 C.M.A. 102, 27 C.M.R. 176 (1959).

conflicts, be a lawful one. Since the UCMJ gave the members nearly unfettered discretion in sentencing, the UCMJ should define the purposes for which sentences may be lawfully imposed.

Sentencing instructions will, of course, still be required of the military judge. By providing a legislative basis for those instructions, their utility is enhanced and their validity is less likely to be seriously questioned, at least on philosophical grounds.

What sentencing philosophies should be adopted by the military justice system? Deterrence, both general and individual, and denunciation have already been mentioned as legitimate concerns. Reformation or rehabilitation is a corollary to individual deterrence, and rehabilitation of offenders is certainly a valid concern. Retribution (or just deserts) was, historically, the primary basis for imposing sentence in the military system; its resurging acceptance in the civilian society as well indicates retribution should not be neglected as a reason for sentencing military offenders.

Once the reasons for sentencing have been legislatively established, then the sentencing system can be scrutinized to determine if it enhances those goals. Our current sentencing rules and procedures are somewhat effective in providing the information necessary to impose an appropriate sentence, but suffer from some defects which can be primarily attributed to engrafting rules of evidence which are designed to prevent the conviction of the innocent rather than determine the just punishment of the guilty. To fully effectuate goals of deterrence, rehabilitation, denunciation, and retribution, certain changes can and should be made, without materially changing the adversarial structure of the sentencing hearing.

Limitations on the nature and format of government sentencing evidence should be removed, and replaced with a simple rule of relevance. All relevant evidence, regardless of form, should be admissible. Relevance can be defined as evidence which will aid the members in imposing a sentence compatible with the goals for sentencing established for trials by court-martial. Rather than attempting to sort relevant sentencing evidence into neat little boxes such as "aggravation" or "rehabilitative potential" or reflective of "the character of the accused's prior service," any evidence which could be reasonably expected to aid the sentencing authority in imposing sentence should be admissible in the government's sentencing case in chief, so long as it contains some indicia of reliability.

Nor should the rules which guide the form of evidence presented on the merits be permitted to restrict sentencing evidence. A victim's statement should be as readily admissible as the victim's testimony, subject of course, to the accused's right of rebuttal. Given the concern of the federal government as well as the armed forces for assisting victims of crimes, forcing a victim to present his or her story only through testimony is hard to justify. While rebuttal may be more difficult than cross-examination for the accused, the equities are on the side of the victim in the sentencing phase. Evidence of prior offenses contained in the accused's enlistment records may not be evidence of the accused's prior service, but may certainly have a bearing on the type and duration of punishment which should be imposed.

Objections to sentencing evidence should be limited to grounds of factual inaccuracy and irrelevance. The absence of a check mark or even a legible signature should not bar admission of a record of nonjudicial punishment, absent an objection that the record pertains to some one else, or that the record reflects an event which did not occur. Objections which are currently frequently asserted, such as omissions in checking blocks on the form or the absence of results of appellate review are matters the defense can and should raise, but they should go to the weight given the document, not its admissibility.

The adversarial sentencing system should be retained. The defense should continue to have the right to present all extenuation and mitigation evidence it desires, as well as the right to rebut matters presented by the government. The adversarial hearing should follow the format of the findings phase as far as presentation of evidence goes, i.e. direct examination of witnesses, followed by cross-examination and rebuttal, but hearsay rules should not be applied. The military judge should control the format, not the content of what is presented. This will provide for a fuller hearing than normally permitted in federal court, but will serve to reduce the gamesmanship which serves no real purpose at a sentencing hearing.

The federal rules requiring disclosure of the presentence report prevent unfair surprise. The Manual's discovery rules serve the same purpose. The defense counsel who has not requested discovery of any documents the prosecution intends to introduce on sentencing cannot claim surprise or lack of opportunity to rebut. While the military judge should be given some discretion to



deal with situations like the one which arose in *Weston*,<sup>488</sup> where rebuttal is impossible due to the completely fanciful nature of the "evidence" presented, the sentencing rules should clearly reflect that the rules of evidence as applied on the merits do not govern admissibility of sentencing evidence.

Given that sentencing by members or military judges will continue to be an option of the accused, changes to the rules about what instructions the members may receive on the collateral consequence of a sentence are needed. The differences in the sentences imposed by judges as compared to members may well be due, at least in part, to deliberate attempts to keep the members ignorant about the consequences of the sentences they impose. It seems irrational to permit the members to hear testimony about a rehabilitative program for sex offenders at the United States Disciplinary Barracks but refuse to permit them to be told the sentence length necessary to be incarcerated there. The military judge, on the other hand, may legitimately consider what he or she knows about the confinement policies of the service.<sup>489</sup> The magnitude of the anomaly appears even greater when we consider that commanders and others may be informed about these policies at any time *except* when they are members of a court-martial.<sup>490</sup> The lack of information can work to the

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<sup>488</sup>448 F.2d 626 (9th Cir. 1971).

<sup>489</sup>In his testimony before the Advisory Committee, Colonel James G. Garner, the Chief Trial Judge of the Army, commented that it was his policy to send a judge to visit the various confinement facilities and to prepare a memorandum detailing what he had learned on the visit. Each Army trial judge received a copy of the memorandum. 1 Adv. Comm. Rep., *supra* note 15, at 117. Expecting the trial judge to disregard this knowledge in imposing sentence is nonsensical. The Court of Military Appeals has approved of a military judge exercising knowledge about sentencing policies obtained out of court. In *United States v. Hannan*, 17 M.J. 115, 123-124 (C.M.A. 1984), the court commented:

Among the objects of punishment is rehabilitation, and parole is one of the correctional tools utilized to facilitate rehabilitation of prisoners. Thus, in seeking to arrive at an appropriate sentence, Judge Wold properly took into account the rules governing parole eligibility. Indeed military judges can best perform their sentencing duties if they are aware of the directives and policies concerning good-conduct time, parole, eligibility for parole, retraining programs and the like.

<sup>490</sup>Commanders of battalion and brigade-sized units who attend the Senior Officers Legal Orientation Course at The Judge Advocate General's School, Army, may sign up for an elective which provides some detailed information about the administrative consequences of sentences. Informal education is often provided by trial and defense counsel in less formal settings. Members of courts-martial are often concerned with the so-called "collateral consequences" of the sentences they adjudge, and the restrictive rules make little sense: "In fact, every time a court member asks us what are the certain administrative consequences, we instruct them to ignore them and not to be concerned with that, which is patently ridiculous to give an adequate sentence that considers the questions of justice to

accused's disadvantage as well. For example, most soldiers sent to the U.S. Army Correctional Activity who do not receive a punitive discharge are administratively eliminated at the end of their sentence, with a general discharge.<sup>491</sup> If members were aware of this result, fewer punitive discharges might be adjudged, at least in borderline cases.<sup>492</sup>

One reason for the lighter sentences imposed by members as compared to military judges<sup>493</sup> may well be the judge's understanding (or misunderstanding) of the good time and parole release system. The members are instructed not to rely on the mitigation of their sentence by any higher authority.<sup>494</sup> The judge, on the other hand, has a difficult time disregarding what he knows, and may thus impose a harsher sentence. If the demise of the Federal Parole Commission, and indeed the whole parole system, affects the release of military convicts as well, providing information about the length of time served before release and the system for awarding good time credits may be a means of ameliorating the problem.

## VII. CONCLUSION

The reform of the military sentencing system, urged over a decade ago by General Prugh, may finally come. The critical first step in this reform process is to define the goals for court-martial sentencing. In this process, the aims and purposes of military justice must dictate the result. Once goals for sentencing are adopted, the military sentencing procedures must be critically examined to determine how well they effectuate those goals.

Our current sentencing practices, while in many ways superior to the federal procedure, are the result of happenstance rather than design. The evidentiary rules applied to sentencing irrationally limit the nature of the evidence considered by the sentencing agency. This protectionist approach strikes an imbalance between the rights of an accused and the interests of military society. A defense bias in the admissibility of evidence can

ignore the administrative consequences." 1 Adv. Comm. Rep., *supra* note 15, at 135 (transcript of hearings, testimony of Colonel Donald B. Strickland, Chief Trial Judge, United States Air Force).

<sup>491</sup>Telephone Interview with Captain Roland D. Meisner, *supra* note 107.

<sup>492</sup>If the members knew that the likelihood of the accused being returned to his military unit after completion of his sentence was very low, they might be willing to let the correctional facility administratively discharge him, instead of adjudging a punitive discharge.

<sup>493</sup>1 Adv. Comm. Rep., *supra* note 15, at 25-26, indicates that sentences imposed by members are generally less severe than those imposed by military judges.

<sup>494</sup>Benchbook, para. 2-37.

conceivably be justified prior to findings, but once an offender has been convicted, the military's interest in adjudging an appropriate sentence becomes paramount. All information which is relevant and carries some indicia of reliability, whether technically hearsay or not, should be available to the sentencing agency.

The current practice mandates uninformed sentencing. So long as sentencing by members is retained, they should have access, either through instructions or some alternative method, to the same type of information that military judges have about the collateral consequences of the sentences they impose. Adjudging a fair and adequate sentence is an extremely difficult undertaking; without an understanding of correctional policies and practices, such as good-time credits and parole, it becomes a matter of chance, rather than an informed choice.

Given the climate of sentencing reform permeating both the federal and state criminal justice systems, an in-depth examination of the military sentencing system is appropriate. If changes are not undertaken after a logical, systematic examination of our philosophy and practice, an activist Court of Military Appeals is likely to impose on the military its own concept of a proper sentencing practice. If the court's previous "noble experiments" in reforming sentencing practice are any indication, the changes will not be to the advantage of the government.

# INSANITY DEFENSE REFORM

by Major Rita R. Carroll\*

## I. INTRODUCTION

On October 12, 1984, the President of the United States signed the Comprehensive Crime Control Act of 1984 into law.<sup>1</sup> That portion of the act dealing with the insanity defense is called the Insanity Defense Reform Act of 1984.<sup>2</sup> It includes the first federal insanity defense legislation—legislation which substantially changes the law in virtually every federal jurisdiction.<sup>3</sup> It also differs from the insanity standard applied at military courts-martial. This article will review the preexisting law and the weaknesses which precipitated passage of the Insanity Defense Reform Act. It will examine the changes to the federal law, and it will discuss the proposed amendment<sup>4</sup> to the Uniform Code of Military Justice<sup>5</sup> incorporating the salient provisions of the federal law. The article evaluates the adequacy of the proposal in meeting the military system's needs within legal constraints and concludes that reform can effectively remedy the deficiencies of the present insanity defense while avoiding some of the problem areas in the federal law.

## II. THE NEED FOR REFORM

While reform of the law on insanity was under consideration for over a decade,<sup>6</sup> the events of March 30, 1981, dramatically

\*Judge Advocate General's Corps, United States Army. Currently assigned as Chief, Civil Law, Mannheim Law Center, 21st Support Command, Federal Republic of Germany, 1986 to present. Formerly assigned as Branch Chief, Defense Appellate Division, U.S. Army Legal Services Agency, Falls Church, Virginia, 1982-1985; Center Judge Advocate, Letterman Army Medical Center, Presidio of San Francisco, California, 1980-1982; Trial Counsel, Butzbach Legal Center, 3d Armored Division, 1978-1980. J.D., University of Texas School of Law, 1976; M.S., University of Texas (El Paso), 1972; A.B., Wellesley College, 1967. Completed the 34th Judge Advocate Office Graduate Course, 1986. Member of the bar of the State of Texas. Coauthor of *The Commander-Attorney Relationship*, Infantry, (Sep.-Oct. 1982), at 27. This article is based upon a thesis submitted in partial satisfaction of the requirements for completion of the 34th Judge Advocate Officer Graduate Course.

<sup>1</sup>Pub. L. No. 98-473, 98 Stat. 1976 (1984).

<sup>2</sup>*Id.* at 2057 [hereinafter the Insanity Defense Reform Act].

<sup>3</sup>18 U.S.C. § 20 (Supp. III 1985); 18 U.S.C. §§ 4241-47 (Supp. III 1985).

<sup>4</sup>A bill has been submitted to Congress as Department of Defense legislation. Telephone interview with Lieutenant Colonel Gary Casida, U.S. Army, member of the Joint Services Committee on Military Justice (March 5, 1986). A copy of the proposal is included at the Appendix.

<sup>5</sup>10 U.S.C. §§ 801-940 (1982).

<sup>6</sup>National Comm. on Reform of Fed. Laws, *Study Draft of a New Federal Criminal Code* (1970).

directed public attention to the defense. On that date John W. Hinckley, Jr., attempted to assassinate the President of the United States. It quickly became apparent, to the outrage of the public, that he would rely on the defense of insanity to excuse his conduct.<sup>7</sup> On June 21, 1982, a jury found Hinckley not guilty by reason of insanity.

The outcome of the Hinckley trial crystallized the misgivings with which many people regarded the insanity defense. To an outside observer the Hinckley scenario illustrated the most glaring deficiencies in the system: Hinckley committed a terrible offense in full public view, but by having the financial resources to summon extensive expert psychiatric testimony, he obtained an acquittal.

The Hinckley trial also had considerable impact on the Congressional hearings which served as a basis for the legislation reforming the defense. These took place during June, July, and August, 1982, in the aftermath of Hinckley's acquittal. On June 24, 1982, three days after Hinckley's trial, five of the jurors who delivered that verdict testified before the Senate Subcommittee on Criminal Law of the Committee on the Judiciary.<sup>8</sup> The proponents of many of the bills under consideration stressed the public concern that resulted from the Hinckley acquittal. The transcript of the hearings reflects the committee members' concern and frustration that the system as it then existed was unable to protect the public either from the mentally responsible criminal who nevertheless could obtain an acquittal by reason of insanity<sup>9</sup> or from the person who would not be criminally culpable by any

<sup>7</sup>See, e.g., *The Insanity Plea on Trial*, Newsweek, May 24, 1982, at 56.

<sup>8</sup>*Limiting the Insanity Defense: Hearings on S. 818, S. 1106, S. 1558, S. 1995, S. 2572, S. 2658, and S. 2669 Before the Subcomm. on Crim. Law of the Comm. on the Judiciary, United States Senate, 97th Cong., 2d Sess. (1982) [hereinafter *Senate Subcomm. Hearings*].*

<sup>9</sup>*Id.* The references to John W. Hinckley, Jr., and his trial are too numerous to list, but two examples are:

Mr. Chairman, I am deeply disturbed by the Hinckley verdict. I consider it one of the greatest miscarriages of justice of our nation's history.

(opening statement of Howell Heflin, a U.S. Senator from Alabama);

The public outcry for the implementation of an appropriate alternative to the existing form of the insanity defense has augmented to a plaintive cry for change now in the wake of extensive media coverage of notorious crimes, such as that of John W. Hinckley, Jr., which serve as examples of inadequacies of the existing law in this area.

(prepared statement of Orrin G. Hatch, a U.S. Senator from Utah.)

standard but who still presented a danger to society.<sup>10</sup>

The hearings revealed three major problem areas with the insanity defense. First, there was concern that the definition of the defense was overbroad.<sup>11</sup> Every federal circuit had adopted a version of the American Law Institute's (ALI) Model Penal Code insanity definition.<sup>12</sup> This standard provided:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.<sup>13</sup>

The American Law Institute developed this standard in response to criticism that the *M'Naughten*<sup>14</sup> test, which originated in England and became the predominant rule in the United States, was too strict.<sup>15</sup> The Senate committee concluded that the ALI test had gone too far in relaxing the *M'Naughten* standard.<sup>16</sup>

Second, there was concern that placing the burden on the government to prove the defendant's sanity resulted in too many acquittals. Third, Congress was concerned that the rules in effect provided too much latitude in the use of expert testimony.<sup>17</sup> Testimony at the hearings criticized the spectacle of expert witness contradicting expert witness, much to the confusion of the jury:

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<sup>10</sup>*The Insanity Defense*: Hearings on S. 818, S. 1106, S. 1558, S. 2669, S. 2672, S. 2678, S. 2745, and S. 2780 before the Comm. on the Judiciary, United States Senate, 97th Cong., 2d Sess. (1982) [hereinafter *Senate Hearings*]. (statement of Richard J. Bonnie, Professor of Law and Director, Institute of Law, Psychiatry and Public Policy, University of Virginia).

<sup>11</sup>S. Rep. 225, 97th Cong., 2d Sess. 222, reprinted in 1984 U.S. Code Cong. & Ad. News 3404 [hereinafter *Legislative History*].

<sup>12</sup>See Annot., 56 A.L.R. Fed. 327 (1982) for a listing of the specific test applied in the various federal circuits.

<sup>13</sup>Model Penal Code § 4.01 (Proposed Official Draft 1962)

<sup>14</sup>*M'Naughten's Case*, 8 Eng. Rep. 718 (1843). Under *M'Naughten*, an accused is not criminally responsible if, at the time of the offense, he was "laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong."

<sup>15</sup>See Trant, *American Military Insanity Defense*, 99 Mil. L. Rev. 1, 42-55 (1983), for a discussion of the development of American law in this area.

<sup>16</sup>See generally *Legislative History*, supra note 11.

<sup>17</sup>*Insanity Defense in Federal Courts*: Hearings on H.R. 6783 and Related Bills before the Subcomm. on Crim. Justice of the Comm. on the Judiciary, House of Representatives, 97th Cong., 2d Sess. (1982) [hereinafter *House Hearings*] (testimony of Peter Arenella, Professor of Law, Boston University School of Law).



- As long as the law allows psychiatrists and psychologists to testify broadly about mental health issues that are either speculative or irrelevant to criminal justices issues, we are going to encourage the battle of the experts and the circus atmosphere we now have in trials will continue no matter what insanity defense is used.<sup>18</sup>

In addition, there was concern that any defendant with the money to hire experts could successfully employ the defense.<sup>19</sup> Finally, many witnesses appearing at the hearings, including experts in psychiatry, were critical of the practice that permitted expert testimony going to the ultimate issue.<sup>20</sup>

Although the primary focus of Congress was the use of the insanity defense at trial, the hearings also addressed the disposition of the offender who is acquitted by reason of insanity.

Witnesses expressed their concern that, outside the District of Columbia, the federal court system lacked a mechanism to deal with the defendant who is acquitted only by reason of insanity.<sup>21</sup> His acquittal had the same legal effect as that of the defendant who successfully defends against the charges on the merits. Both leave the courtroom free and legally innocent. The federal system had no authority to detain, evaluate, or commit the acquitted insane offender. Civil commitment was entirely within the domain of the state. Under the best of circumstances the U.S. attorney's office might have an informal arrangement with local state officials to initiate civil commitment proceedings in the appropriate case immediately upon acquittal. Otherwise, even if the local officials took an interest, there could still be a delay of days or weeks between acquittal and some form of custody.

In most states civil commitment of an insane offender is subject to the same standard as commitment of a nonoffender; the state has the burden of proving by a preponderance of the evidence that the individual should be committed.<sup>22</sup> To complicate matters, the court does not look at the person's state of mind at

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<sup>18</sup>*Id.* (testimony of Stephen Morse, Professor, University of Southern California Law Center).

<sup>19</sup>Senate Hearings, *supra* note 10 (statement of Orrin G. Hatch, U.S. Senator from Utah).

<sup>20</sup>*Id.* (statement by the American Psychiatric Association on Issues Arising from the Hinckley Trial).

<sup>21</sup>*Legislative History*, *supra* note 11, at 238-239, 1984 U.S. Code Cong. & Ad. News at 3420-21.

<sup>22</sup>*Addington v. Texas*, 441 U.S. 418 (1979). A number of states and the District of Columbia have a separate procedure by which an acquittal by reason of insanity of itself supports commitment. See *United States v. Jones*, 463 U.S. 354 (1983).

the time of the offense, but instead looks at his mental condition at the time of the proposed commitment. Therefore, the evidence used to gain his acquittal, even if available, may not be relevant to the commitment proceeding. Because the verdict may be ambiguous (implying perhaps innocence on the merits as well as insanity) the acquittal is very likely to have no probative value. Consequently, although an individual has just been acquitted by reason of his insanity, he still may not meet the state's standard for civil commitment. Even if the court orders commitment, the commitment facility may at any time decide to release the individual. In any event, upon acquittal, the individual is no longer under the jurisdiction of the criminal court.<sup>23</sup>

Bills submitted to the Senate and to the House of Representatives addressed these concerns in a variety of ways, ranging from minor modifications of the definition of insanity to abolition of the defense.<sup>24</sup> The Department of Justice supported an approach which, in effect, would eliminate the insanity defense: a defendant would be held criminally culpable if the government could prove beyond a reasonable doubt every element of the offense alleged.<sup>25</sup> Thus, the man who killed someone thinking that the victim was the devil and that God had so ordered it for the salvation of the world would be guilty of murder because he in fact intended to take that life. The person who thought he was squeezing an orange and not a person's throat would escape culpability since in that case the government would fail to prove *mens rea*—an element of the offense. This *mens rea* approach represented the most extreme reform proposal.

## II. CHANGES TO THE FEDERAL LAW ON INSANITY.

### A. A RETURN TO A MORE RESTRICTIVE STANDARD

Congress rejected the *mens rea* approach in favor of retaining the insanity defense, but formulated a much narrower standard for insanity than the ALI test.<sup>26</sup> The Insanity Defense Reform Act provides the following:

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<sup>23</sup>Senate Hearings, *supra* note 10 (statement of Rudolph W. Guiliani, Associate Attorney General); House Hearings, *supra* note 17 (prepared statement of Arlen Specter, U.S. Senator from Pennsylvania).

<sup>24</sup>Senate Hearings, *supra* note 10.

<sup>25</sup>Senate Hearings, *supra* note 10 (statement of Rudolph W. Guiliani, Associate Attorney General).

<sup>26</sup>See *supra* note 13 and accompanying text.

## § 20. Insanity defense

(a) Affirmative Defense. It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) Burden of Proof. The defendant has the burden of proving the defense of insanity by clear and convincing evidence.<sup>27</sup>

The ALI definition had provided two ways in which the defendant might be absolved of criminal culpability: (1) by lacking the substantial capacity to appreciate the criminality of his conduct (the cognitive prong); or (2) by lacking the substantial capacity to conform behavior or conduct to the requirements of the law (the volitional prong). The volitional prong had been the object of extensive criticism from within both the legal and psychiatric community.<sup>28</sup> In a prepared statement, David Robinson, Jr., a professor of law, advised the Committee on the Judiciary:

No test is available to distinguish between those who *cannot* and those who *will not* conform to legal requirements. The result is an invitation to semantic jousting, metaphysical speculation and intuitive moral judgments masked as factual determinations.

It is clear that the control tests, such as the American Law Institute one, have potential for expansion so sweeping as to vitiate the rule of law. As Dr. Daniel Robinson at Georgetown University has said, "Quite simply, where there is no settled body of knowledge, no accepted methods of investigation, no accepted validity and reliability of relevant measures, no predictive efficiency, no widely adopted and testable theoretical foundation, there can be no expertise, and, therefore, no expert testimony."<sup>29</sup>

Because of this type of criticism, Congress eliminated the volitional prong of the test.<sup>30</sup>

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<sup>27</sup>18 U.S.C. § 20 (Supp. III 1985).

<sup>28</sup>Senate Hearings, *supra* note 10 (prepared statement of David Robinson, Jr., Professor of Law at George Washington University).

<sup>29</sup>*Id.*

<sup>30</sup>Legislative History, *supra* note 11 at 225-229, 1984 U.S. Code Cong. & Ad. News at 3407-11.

Another criticism of the ALI standard centered on the imprecise formulation, "substantial lack of capacity."<sup>31</sup> The ALI adopted this language in response to criticism that the M'Naughten requirement of total incapacity was too inflexible.<sup>32</sup> In the interest of tightening the definition to ensure that only those exceptional individuals who should be acquitted meet the standard, Congress eliminated that language, substituting "was unable" in its place. The new definition not only resurrects the requirement of total incapacity, but also requires that the mental disease or defect be "severe." Minor mental disorders will no longer support an insanity defense, even if a psychiatrist would be willing to testify that the disorder made an individual unable to appreciate the nature or wrongfulness of his acts.

In a further effort to limit the confusion accompanying psychiatric testimony and to avoid circumventing the intent behind the reforms in this area, Congress added the provision, "Mental disease or defect does not otherwise constitute a defense."<sup>33</sup> As explained in the Committee's report on this legislation:

This [language] is intended to insure that the insanity defense is not improperly resurrected in the guise of showing some other affirmative defense, such as that the defendant had a "diminished responsibility" or some similarly asserted state of mind which would serve to excuse the offense and open the door, once again, to needlessly confusing psychiatric testimony.<sup>34</sup>

### ***B. BURDEN OF PROOF SHIFTED TO THE DEFENDANT***

Prior to this legislation, Federal law required the government to prove the defendant's mental responsibility beyond a reasonable doubt.<sup>35</sup> In one of the more significant changes to the law, Congress shifted to the defendant the burden of proving his insanity.<sup>36</sup>

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<sup>31</sup>House Hearings, *supra* note 17 (testimony of Alan A. Stone, M.D., Professor of Law and Psychiatry, Harvard Medical and Law Schools).

<sup>32</sup>Model Penal Code § 4.01 Comment (Tent. Draft No. 4, 1955).

<sup>33</sup>18 U.S.C. § 20(a) (Supp. III 1985).

<sup>34</sup>Legislative History, *supra* note 11, at 229, 1984 U.S. Code Cong. & Ad. News at 3411.

<sup>35</sup>United States v. Davis, 160 U.S. 500 (1895).

<sup>36</sup>18 U.S.C. § 20(b) (Supp. III 1985).

### C. SCOPE OF EXPERT TESTIMONY

Another problem Congress addressed through this legislation was the domination of the insanity defense by expert psychiatric testimony. The committee hearings produced extensive criticism of the role of the psychiatric expert when insanity is at issue. The legislative history quotes one witness testifying for the Department of Justice:

Since the experts themselves are in disagreement about both the meaning of the terms used to define the defendant's mental state and the effect of a particular state on the defendant's actions—but still freely allowed to state their opinion to the jury on the ultimate question of the defendant's sanity—it is small wonder that trials involving an insanity defense are arduous, expensive, and worst of all, thoroughly confusing to the jury. Indeed the disagreement of the experts is so basic that it makes rational deliberation by the jury virtually impossible.<sup>37</sup>

Several psychiatric experts who testified agreed that opinions about whether the defendant was insane at the time of the alleged offense, whether he could appreciate the wrongfulness of his conduct, or whether he could conform his acts to the requirements of the law are beyond the scope of the psychiatrist's expertise.<sup>38</sup>

Congress addressed this problem by amending Rule 704 of the Federal Rules of Evidence to provide:

No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.<sup>39</sup>

Previously, opinion testimony was not objectionable solely because it embraced an ultimate issue to be decided by the trier of fact.<sup>40</sup>

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<sup>37</sup>*Legislative History*, *supra* note 11, at 223, 1984 U.S. Code Cong. & Ad. News at 3407.

<sup>38</sup>*House Hearings*, *supra* note 17 (testimony of Alan A. Stone, M.D., Professor of Law and Psychiatry, Harvard Medical and Law Schools; testimony of Peter Arenella, Professor of Law, Boston University School of Law).

<sup>39</sup>Fed. R. Evid. 704.

<sup>40</sup>Fed. R. Evid. 704, 28 U.S.C. Appendix (1982) (amended 1984).

### **D. POST-ACQUITTAL COMMITMENT PROCEDURES**

The Insanity Defense Reform Act also took significant steps to deal with the defendant acquitted on the basis of insanity. Outside the District of Columbia, federal law provided for only two verdicts, "guilty" and "not guilty." While a jury could characterize an acquittal as being "only by reason of insanity," the additional language was surplusage which had no legal significance.<sup>41</sup> As noted earlier, this type of ambiguous acquittal can make it more difficult to obtain a civil commitment order.<sup>42</sup>

The congressional committees studying the problem considered three additional verdicts: (1) guilty, but insane; (2) guilty, but mentally ill; and (3) not guilty only by reason of insanity. There were two objections to the "guilty, but insane" verdict. One criticism focused on the ambiguity inherent in such a verdict. The verdict clearly reflects the determination that the defendant committed the offense; it also indicates a finding of mental disease or defect. It does not show to what extent, if any, the mental disease or defect affected the defendant's ability to appreciate the quality or wrongfulness of his act. When the law provides for an insanity defense, the relationship is critical. The other criticism follows from the implied contradiction of being both guilty and insane when the legal significance of a finding of insanity includes the implication that the defendant is not criminally culpable.<sup>43</sup>

The second approach, allowing a "guilty, but mentally ill" verdict received enthusiastic support from several witnesses.<sup>44</sup> Michigan and Indiana law provided for this verdict in addition to the verdict of not guilty by reason of insanity. "Guilty, but mentally ill" holds the defendant criminally responsible while indicating a need for treatment.<sup>45</sup> The verdict appealed to those whose primary concern was for public safety and who were less convinced that mental status should absolve a person of criminal

<sup>41</sup>See *United States v. McCracken*, 488 F.2d 406 (5th Cir. 1974).

<sup>42</sup>See *supra* notes 21-23 and accompanying text.

<sup>43</sup>*Senate Subcomm. Hearings, supra* note 8 (statement of Edward Zorinsky, U.S. Senator from Nebraska); *Senate Hearings, supra* note 10 (statement of Rudolph W. Guiliani, Associate Attorney General).

<sup>44</sup>*House Hearings, supra* note 17 (testimony of Paul Rosenbaum, former chairman, Michigan House Judiciary Comm); *Senate Hearings, supra* note 10 (statement of Dan Quayle, U.S. Senator from Indiana).

<sup>45</sup>McGraw, Farthing-Capowich, & Kellitz, *The "Guilty But Mentally Ill" Plea and Verdict: Current State of Knowledge*, 30 Vill. L. Rev. 117 (1985).



culpability. This alternative drew criticism from different camps. Prosecution-oriented commentators feared it would open the way to more expert psychiatric testimony when one of the objects of reform was to limit such testimony.<sup>46</sup> On the other hand, those who favored retaining the insanity defense feared that "guilty but mentally ill" would be an attractive alternative to jurors who might otherwise feel reluctantly compelled to acquit.<sup>47</sup>

Congress rejected the first two alternatives and instead amended federal law to include as a possible verdict "Not guilty only by reason of insanity."<sup>48</sup> Such a finding serves two functions. It signals unequivocally that were it not for the defendant's mental state, the jury would have convicted him. The verdict also establishes the basis for the court to commit the accused to a psychiatric institution. Following acquittal by reason of insanity, the individual is placed in custody, examined, and a hearing is held within forty days of the acquittal to determine if further commitment is required.<sup>49</sup> An individual acquitted by reason of insanity of an offense involving bodily injury or serious property damage must prove by clear and convincing evidence that "his release would not create substantial risk of bodily injury to another person or serious damage to property of another due to a present mental disease or defect."<sup>50</sup> A person acquitted of other offenses has the burden of proof by a preponderance of the evidence.<sup>51</sup>

If the person acquitted fails to meet the burden of proof, the court shall place him in the custody of the Attorney General, who will seek hospitalization for the individual in the appropriate state facility if possible, but, alternatively, shall hospitalize the person.<sup>52</sup> Moreover, the government must be notified whenever release of the individual is under consideration and can request a hearing of the matter.<sup>53</sup> Release requires a court order.<sup>54</sup> The law also provides a commitment procedure for a hospitalized defendant whose sentence is about to expire or for an accused who will

<sup>46</sup>*Senate Hearings*, *supra* note 10 (statement of Rudolph W. Guiliani, Associate Attorney General; letter to Strom Thurmond, Chairman, Comm. on the Judiciary, from Robert A. McConnell, Assistant Attorney General).

<sup>47</sup>*Id.* (statement of Rudolph W. Guiliani, Associate Attorney General; prepared statement of Randolph A. Read, M.D., Forensic Psychiatrist).

<sup>48</sup>18 U.S.C. § 4242 (Supp. III 1985).

<sup>49</sup>18 U.S.C. § 4243 (Supp. III 1985).

<sup>50</sup>*Id.*

<sup>51</sup>18 U.S.C. § 4243(d) (Supp. III 1985).

<sup>52</sup>18 U.S.C. § 4243(e) (Supp. III 1985).

<sup>53</sup>18 U.S.C. § 4243(f) (Supp. III 1985).

<sup>54</sup>*Id.*

not be prosecuted because of his mental condition, and release or lack of restraint is imminent. This provision might come into play, for example, if the appropriate state is not interested in committing the individual.<sup>55</sup>

#### **IV. RAMIFICATIONS OF THE CHANGES TO THE INSANITY DEFENSE**

Despite tremendous public pressure, Congress exercised considerable restraint in reforming the insanity defense. The final legislation rejected in large measure those proposals which posed potential legal problems, some of constitutional dimension. While Congress could have abolished the insanity defense, it chose instead only to restrict the standard. It rejected forms of verdicts which arguably could facilitate the conviction of the mentally ill offender. Some of the changes, nevertheless, extend to areas in which the law is unsettled. This portion of the article will examine those areas of the new law in which challenge is likely to result.

##### **A. THE CONSTITUTIONALITY OF PLACING THE BURDEN OF PROOF OF THE EVIDENCE ON THE DEFENDANT**

In a criminal justice system whose fundamental tenet is the presumption of innocence, placing on the defendant the burden to prove an issue critical to criminal culpability raises questions of due process.

In 1885, in *United States v. Davis*,<sup>56</sup> the Supreme Court held that after the defense of insanity is raised the government must prove beyond a reasonable doubt the sanity of the accused:

Strictly speaking, the burden of proof as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. Giving to the prosecution, where the defense is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question from the time the plea of not guilty is entered until the return of the verdict is whether upon all the evidence, by

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<sup>55</sup>18 U.S.C. § 4246 (Supp. III 1985).

<sup>56</sup>160 U.S. 500 (1885).

whatever side adduced, guilt is established beyond a reasonable doubt . . . his guilt cannot be said to have been proved beyond a reasonable doubt—his will and his acts cannot be held to have joined in perpetrating the murder charged, if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing crime, or whether he willfully, unlawfully, deliberately and of malice aforethought took the life of the deceased.<sup>57</sup>

Federal courts applied the standard set out in *Davis* until it was changed by this legislation.<sup>58</sup>

In 1952, in *Leland v. Oregon*,<sup>59</sup> however, the Supreme Court rejected the proposition that the defendant's sanity, when adequately raised, became an essential element of the offense; it held there was no constitutional requirement for the government to prove sanity beyond a reasonable doubt. In *Leland* the Supreme Court upheld an Oregon statute which required the *accused* to establish his insanity beyond a reasonable doubt. The Court distinguished the *Davis* standard as being based on the Court's supervisory powers; the Constitution did not require the government to bear the burden of proving the defendant's mental responsibility.

Two subsequent decisions by the Supreme Court gave rise to the conjecture that the court might retreat from its position upholding the state's authority to require that the defendant prove his insanity. *In re Winship*<sup>60</sup> held that due process prohibits a criminal conviction that is not supported by "proof beyond reasonable doubt of every fact necessary to constitute the crime charged."<sup>61</sup> Because that case dealt with a civil delinquency proceeding against a juvenile, the Court did not address the critical contention expressed by the dissent in *Leland v. Oregon*—that mental responsibility is an essential element of the offense and must be proved beyond a reasonable doubt before the government can obtain a valid conviction. The *Winship* opinion stressed, however, the Constitutional status of the requirement that the government prove every element of its case beyond a reasonable doubt.<sup>62</sup>

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<sup>57</sup>*Id.* at 487-488.

<sup>58</sup>See, e.g., *United States v. Davis*, 592 F.2d (5th Cir. 1979); *United States v. Iverson*, 588 F.2d 194 (5th Cir. 1979).

<sup>59</sup>343 U.S. 790 (1952).

<sup>60</sup>397 U.S. 358 (1970).

<sup>61</sup>*Id.* at 364.

<sup>62</sup>*Id.*

Following *Winship*, the Supreme Court declared Maine's murder statute unconstitutional in *Mullaney v. Wilbur*.<sup>63</sup> *Mullaney* held invalid Maine's requirement that the defendant prove heat of passion in order to rebut the statutory presumption that he committed the offense with "malice aforethought" and was therefore guilty of the more serious offense of murder. The Court reasoned that since Maine law distinguished murder from manslaughter on the basis of provocation, the absence of provocation became a necessary element of murder. The state, then, could not shift the burden to the defense to negate that "element." One remarkable aspect of *Mullaney* is that the Court intervened in an area generally considered to be the primary concern of the states—the administration of criminal law.<sup>64</sup> The Court's analysis centered upon the significant difference between the two offenses rather than how the state had defined them. The decision raised the question whether a state could ever allocate the burden of proof to the defense.<sup>65</sup>

Subsequent Supreme Court decisions provided the answer. A year after *Mullaney*, the Supreme Court, in *Rivera v. Delaware*,<sup>66</sup> dismissed for want of a substantial federal question an appeal attacking the constitutionality of a Delaware statute that required a criminal defendant raising an insanity defense to prove the defense by a preponderance of the evidence. Two years later, in *Patterson v. New York*,<sup>67</sup> the Court examined a New York murder statute. *Patterson* unequivocally reversed any impression that *Winship* and *Mullaney* signalled a renewed interest in the due process requirements of criminal procedure. The New York law in question required the defendant to prove the affirmative defense that he had acted under extreme emotional disturbance in order to reduce the offense from murder to manslaughter. The Court, in concluding that the New York law did not deprive the defendant of due process of law, reaffirmed the legality of placing the burden of persuasion of affirmative defenses on the defendant. The opinion specifically reaffirmed the holdings in *Leland v. Oregon* and *Rivera v. Delaware* that "the State may refuse to sustain the affirmative defense of insanity unless demonstrated by a preponderance of the evidence."<sup>68</sup>

<sup>63</sup>421 U.S. 684 (1975).

<sup>64</sup>See, e.g., *Fisher v. United States*, 328 U.S. 463, 476 (1945).

<sup>65</sup>Comment, *The Constitutionality of Affirmative Defenses after Patterson v. New York*, 78 Colum. L. Rev. 655, 662 (1978).

<sup>66</sup>429 U.S. 877 (1976).

<sup>67</sup>432 U.S. 197 (1977).

<sup>68</sup>*Id.* at 206.

While shifting the burden of proving insanity by clear and convincing evidence may not deprive the defendant of due process, there are, nevertheless, problem areas requiring caution by the government and by the trial judge. As witnesses at the congressional hearings pointed out, placing the burden of proof of some facts on the government while requiring the defense to prove other aspects (and by a different standard) provides a serious risk of confusion and instructional errors, if not Constitutional error.<sup>69</sup> The recent case of *Francis v. Franklin*<sup>70</sup> illustrates the potential for error in this area. In *Francis* the Supreme Court found a due process violation when a reasonable juror could have understood the instructions on intent as creating a mandatory presumption that the burden of persuasion was satisfied. The trial court will have to exercise extreme care to avoid instructional errors of this nature.

### **B. IMPACT ON THE DEFENSE OF DIMINISHED CAPACITY**

The effect of the legislation on the defendant's ability to defend against specific intent offenses presents another issue of Constitutional dimension. The legislative history of the act indicates that Congress clearly intended to limit the use of evidence of mental disease or defect "to insure that the insanity defense is not improperly resurrected in the guise of showing some other affirmative defense, such as 'diminished responsibility.'"<sup>71</sup> Congress's use of the term "diminished responsibility," however, is subject to different interpretations. The term can refer to either of two distinct doctrines. As a result commentators writing on "diminished" or "partial" responsibility/capacity find it necessary at the onset to define precisely the theory being addressed.<sup>72</sup> One theory provides a variant of the insanity defense by way of an affirmative defense. Under this defense of "partial insanity," a jury could find a defendant guilty of a lesser offense.<sup>73</sup> There is no question that Congress intended an all-or-nothing defense of insanity and that "partial insanity" will not be a defense.

<sup>69</sup>Senate Hearings, *supra* note 10 (statement of Hon. Rudolph W. Guiliani, Associate Attorney General).

<sup>70</sup>105 S. Ct. 1965 (1985); see also *Sandstrom v. Montana*, 442 U.S. 510 (1979).

<sup>71</sup>See *supra* notes 33-34 and accompanying text.

<sup>72</sup>Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 Col. L. Rev. 827, 828-829 (1977); Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. Crim. L. & Criminology 1, 7 (1984); see also *United States v. Brawner*, 471 F.2d 969, 998 (D.C. Cir. 1972).

<sup>73</sup>Morse, *supra* note 72, at 4-5.

The term can also apply to the doctrine which allows a defendant to introduce evidence of mental abnormality to negate a mental element of the offense.<sup>74</sup> Strictly speaking, this doctrine does not set out an affirmative defense; it provides defense rebuttal to one or more of the elements of the alleged offense. If "diminished responsibility" as it appears in the legislative history of the act refers to the latter doctrine, a defendant may not introduce psychiatric testimony unless it is offered in conjunction with an insanity defense.

The wording of the law itself provides little help in determining what Congress meant by "diminished responsibility." It states only, "Mental disease or defect does not otherwise constitute a defense."<sup>75</sup> The fact that the sentence is included in a subparagraph entitled "Affirmative Defense," together with the specific reference to affirmative defenses in the commentary on the provision found in the legislative history,<sup>76</sup> lends support to the position that Congress was not precluding evidence about the defendant's mens rea. Furthermore, another portion of the legislative history appears to anticipate the introduction of expert psychiatric testimony on such issues as premeditation in a homicide case.<sup>77</sup> While the reference deals with the application of the rule of evidence precluding expert testimony on the ultimate issue, it would make little sense to list as an example a type of evidence to which exclusion applies. This was the rationale applied by the federal district court in *United States v. Frisbee*.<sup>78</sup>

In *Frisbee*, the defendant, who was charged with murder, notified the government of his intention to introduce psychiatric testimony to negate the existence of specific intent. The government opposed the admission of this evidence on the basis that 18 U.S.C. § 20 prohibits the admission of psychiatric testimony unless it is offered in conjunction with an insanity defense. The court, in rejecting the government's contention, held:

[S]ection 20 was not intended to regulate the admissibility of expert testimony concerning the existence of a mental element of a crime. The Court believes that the sole purpose of section 20 was to narrowly define the circumstances in which mental disease or defect will

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<sup>74</sup>*Id.* at 1.

<sup>75</sup>18 U.S.C. § 20(a) (Supp. III 1985).

<sup>76</sup>*Legislative History*, *supra* note 11, at 229, 1984 U.S. Code Cong. & Ad. News at 3411.

<sup>77</sup>*Id.* at 231; 1984 U.S. Code Cong. & Ad. News at 3413.

<sup>78</sup>623 F. Supp. 1217 (N.D. Cal. 1985).



excuse otherwise criminal conduct and was not intended to impede an accused's ability to show his or her innocence. To the extent that Congress desired to limit a defendant's ability to negate the existence of specific intent, it did so through rule 704(b) of the Federal Rules of Evidence, which excludes ultimate issue evidence on a defendant's state of mind. Therefore, the Court holds that the Ninth Circuit's rule allowing expert testimony negating the existence of specific intent is unaltered by the enactment of section 20.<sup>79</sup>

The counterargument is that some commentators and courts have used the term "diminished responsibility" to mean precisely the theory that evidence of mental disease or defect not amounting to insanity is admissible to prove lack of specific intent.<sup>80</sup> Notably, the Court of Appeals for the District of Columbia, in *Bethea v. United States*,<sup>81</sup> rejected this doctrine of diminished responsibility.

The stricter interpretation of the provision, i.e., evidence of mental disease or defect is inadmissible except to show insanity, will undoubtedly give rise to heated litigation. While perhaps as many as half the states apply the same exclusion,<sup>82</sup> this area of law is volatile, and the Supreme Court has not squarely addressed the constitutional issue implicit in the exclusion: whether due process requires that evidence of mental illness be admissible when it is offered to negate a requisite mental state.

As a starting point, if a defendant is charged with an offense requiring a specific intent, the government must prove beyond a reasonable doubt the element of specific intent as well as the remaining elements of the charged offense.<sup>83</sup> The defendant, on the other hand, is constitutionally entitled to establish a defense.<sup>84</sup> The government may not arbitrarily limit the right to present relevant, material evidence. In *Washington v. Texas*,<sup>85</sup> the Supreme Court examined a Texas rule of evidence that would not allow persons charged as accomplices to testify, one for the other.

<sup>79</sup>*Id.* at 1223 (footnote omitted).

<sup>80</sup>See *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972); see also W. LaFare & A. Scott, Jr., *Criminal Law* 325-327 (1972) [hereinafter LaFare].

<sup>81</sup>365 A.2d 64 (D.C. 1976), *cert. denied*, 433 U.S. 911 (1977).

<sup>82</sup>See Annot., 22 A.L.R. 3d 1228 (1968 and Supp. 1985) for a listing of the states which exclude expert testimony concerning specific intent.

<sup>83</sup>*In re Winship*, 397 U.S. 358 (1970).

<sup>84</sup>U.S. Const. amend VI; *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967).

<sup>85</sup>388 U.S. 14 (1967).

In reversing the conviction, the Court held that the state could not arbitrarily deny a defendant his sixth amendment right to produce a witness whose testimony would have been relevant and material to his defense. In *Chambers v. Mississippi*,<sup>86</sup> the Supreme Court struck down a Mississippi common law rule of procedure and evidence which prohibited the defendant from effectively presenting a defense. Chambers was accused of a shotgun murder. A co-accused who had earlier been convicted of the same offense had made several confessions to different individuals which exonerated Chambers. The co-accused had later repudiated his confessions. The state declined to call the co-accused as a witness. Consequently, when called by Chambers, he became Chambers' witness, and the common-law rule compelled Chambers to "vouch" for him. This meant that Chambers' ability to cross-examine his witness was severely curtailed. The trial court ruled that Chambers could not produce the witnesses to whom the co-accused had confessed because their testimony would be inadmissible hearsay.

While recognizing "the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures,"<sup>87</sup> the Supreme Court determined that the "voucher" rule as well as the state's application of the hearsay exclusion required close scrutiny when these infringed upon fundamental rights of the accused. The Court determined that the rules in question unreasonably operated to deny the defendant a fair trial.<sup>88</sup>

These three Supreme Court cases, *In re Winship*,<sup>89</sup> *Washington v. Texas*,<sup>90</sup> and *Chambers v. Mississippi*,<sup>91</sup> stand for the combined proposition that the government has the burden of proving beyond a reasonable doubt every essential element of a charged offense including, when applicable, specific intent, and the state may not arbitrarily thwart the defendant's constitutional right to present a defense.

The issue then is whether the exclusion of evidence of mental disease or defect, relevant to specific intent, is arbitrary. Three

<sup>86</sup>410 U.S. 284 (1973).

<sup>87</sup>410 U.S. at 302.

<sup>88</sup>*Id.* at 304.

<sup>89</sup>397 U.S. 358 (1970).

<sup>90</sup>388 U.S. 14 (1967).

<sup>91</sup>410 U.S. 284 (1973).

circuit courts of appeals that have reviewed state exclusions of this nature affirmed the practice.<sup>92</sup>

In *United States v. Wahrlich*,<sup>93</sup> the defendant offered psychiatric testimony to prove he was incapable of forming the requisite specific intent. The Ninth Circuit rejected the defendant's contention that the state's refusal to receive the psychiatric testimony resulted in a denial of due process and equal protection. The court listed the following considerations to support its conclusion:

- (1) in the interest of harmonious federal-state relations, federal courts should not unnecessarily interfere with the state's trial of criminal cases; (2) courts should be extremely reluctant to constitutionalize rules of evidence; (3) the state of the developing art of psychiatry is such that we are not convinced that psychiatric testimony directed to a retrospective analysis of the subtle gradations of specific intent has enough probative value to compel its admission.<sup>94</sup>

In light of the determination that the psychiatric evidence in question did not carry the indicia of reliability important to the Supreme Court in *Chambers*<sup>95</sup> when it examined the excluded hearsay testimony, *Wahrlich* is consistent with *Chambers*. In other words, the Ninth Circuit found that the exclusion was not arbitrary or unreasonable.

The Seventh Circuit reached the same conclusion in *Muench v. Israel*.<sup>96</sup> In that case, the court held that the state was not constitutionally compelled to recognize the doctrine of diminished capacity and could therefore exclude expert testimony offered to establish that the defendant lacked the capacity to form specific intent. In so holding the Seventh Circuit substantially retreated from its decision in *Hughes v. Matthews*,<sup>97</sup> in which it determined that Wisconsin had arbitrarily barred the use of testimony which was relevant and competent according to state law without compelling justification, a practice condemned in *Washington v.*

<sup>92</sup>Campbell v. Wainwright, 738 F.2d 1573 (11th Cir. 1984); Muench v. Israel, 715 F.2d 1124 (7th Cir. 1983); Wahrlich v. Arizona, 479 F.2d 1137 (9th Cir.), cert. denied, 414 U.S. 1011 (1973).

<sup>93</sup>479 F.2d 1137 (9th Cir. 1973).

<sup>94</sup>*Id.* at 1138.

<sup>95</sup>410 U.S. 284 (1973).

<sup>96</sup>715 F.2d 1124 (7th Cir. 1983).

<sup>97</sup>576 F.2d 1250 (7th Cir. 1978).

*Texas*<sup>98</sup> and *Chambers v. Mississippi*.<sup>99</sup> The *Hughes* court summarized its decision as follows:

In conclusion, we emphasize first what we have not done. We have not sought to impose a "diminished responsibility" defense for emotional problems upon Wisconsin. The fashioning of such affirmative defenses involves the type of "subtle balancing of society's interest against those of the accused which has been left to the legislative branch." *Patterson v. New York* [citation omitted]. Nor have we attempted to further "constitutionalize" the law of evidence by constructing a constitutional right to introduce psychiatric testimony. See *Chambers v. Mississippi*, *supra*, 410 U.S. at 308, 93 U.S. 1038 (Rehnquist, J., dissenting). What we have done is to recognize that a state may not relieve the prosecution of its duty to prove all elements of the crime charged beyond a reasonable doubt by improper use of presumptions. We have also recognized the due process right of the defendant to present relevant and competent evidence in the absence of a valid state justification for excluding such evidence. Upon the particular facts of this case, we find Wisconsin's justifications to be inapplicable.<sup>100</sup>

In *Muench v. Israel*<sup>101</sup> the Seventh Circuit distinguished the issue before it from the facts in *Hughes*. Although the defendants in both *Muench* and *Hughes* complained that they were not permitted to produce psychiatric evidence to prove lack of capacity to form an intent to kill, the court in *Muench* maintained:

The question the instant case presents is not the question we decided in *Hughes*. In *Hughes* we determined that when evidence is considered relevant and competent under state laws, a criminal defendant may not be precluded from presenting it in his defense if the policy considerations advanced in support of exclusion are inapplicable in the context of the situation. We took pains in *Hughes* to point out that we were not seeking to constitutionalize the law of evidence nor to impose a diminished responsibility doctrine on Wisconsin. Yet that is just what petitioners in the instant case seek: they

<sup>98</sup>388 U.S. 14 (1967).

<sup>99</sup>410 U.S. 284 (1973).

<sup>100</sup>576 F.2d at 1259.

<sup>101</sup>715 F.2d 1124 (7th Cir. 1983).

argue that they have a constitutional right to present psychiatric evidence of their abnormal personalities in order to prove that they lacked the capacity to form an intent to kill.<sup>102</sup>

The Seventh Circuit rejected the petitioner's contention, and in support of its analysis it cited three Supreme Court cases.

The first, *People v. Troche*,<sup>103</sup> was a California case in which the defendant was tried in a bifurcated proceeding: one hearing to determine guilt on the merits and the other to determine sanity. During the hearing on the merits, all evidence of mental illness was excluded, and the jury was instructed to presume conclusively that the defendant was sane. The court convicted him of murder and sentenced him to death. The California Supreme Court held that state law provided that insanity was either a complete defense or none at all and that the statute violated neither the federal nor state constitution in that regard. The United States Supreme Court dismissed the appeal for want of a substantial federal question.<sup>104</sup>

In 1942, a second California case, *People v. Coleman*,<sup>105</sup> presented the same complaint as *Troche* upon similar facts: Coleman was not permitted to produce evidence of mental abnormalities to show a lack of capacity to form the specific intent to commit first degree murder. The California Supreme Court denied Coleman relief, and the U.S. Supreme Court, citing its disposition of *United States v. Troche*, dismissed Coleman's appeal, as well, for want of a substantial federal question.<sup>106</sup>

The third Supreme Court case in this trilogy was *Fisher v. United States*,<sup>107</sup> decided in 1946. Fisher, charged with murder in the District of Columbia, presented evidence that his mental and emotional qualities at the time of the crime were such that he was incapable of premeditation although his condition did not amount to insanity. The issue before the Court was whether the trial court erred by failing to instruct the jury that petitioner's mental and emotional characteristics should be considered on the issues of deliberation and premeditation. The Court determined that, according to the law in the District of Columbia, "an accused is not entitled to an instruction based upon evidence of mental weak-

<sup>102</sup>*Id.* at 1137.

<sup>103</sup>206 Cal. 35, 273 P. 767 (1928), appeal dismissed, 280 U.S. 524 (1929).

<sup>104</sup>*Id.*

<sup>105</sup>20 Cal.2d 399, 126 P.2d 349, appeal dismissed, 317 U.S. 596 (1942).

<sup>106</sup>*Id.*

<sup>107</sup>328 U.S. 463 (1946).

ness, short of legal insanity, which would reduce his crime from first to second degree murder."<sup>108</sup>

The Court went on to say:

We express no opinion upon whether the theory for which petitioner contends should or should not be made the law of the District of Columbia. Such a radical departure from common law concepts is more properly a subject for the exercise of legislative power or at least for the discretion of the courts of the District. The administration of criminal law in matters not affected by constitutional limitations or a general federal law is a matter peculiarly of local concern.<sup>109</sup>

The court in *Muench* relied heavily on those three cases:

In our view, *Troche*, *Coleman*, and *Fisher* are dispositive of the question presented in the instant case. *Troche* and *Coleman* deemed petitioners' due process arguments as insubstantial, and *Fisher* carefully considered the same arguments and did not even find them sufficiently compelling to justify an exercise of the Court's supervisory authority over the District of Columbia courts. A theory that the Supreme Court has twice refused to impose upon the state of California, albeit in summary dispositions, and has refused to impose upon the District of Columbia courts under its supervisory powers is not one that this lower federal court will impose on the state of Wisconsin as a matter of federal constitutional due process.<sup>110</sup>

The court then addressed whether Wisconsin law, after the *Hughes* decision, had validly ascertained that expert psychiatric testimony offered to show lack of specific intent was irrelevant and incompetent.<sup>111</sup> It concluded that the proffered testimony concerning the existence of a personality disorder was not probative of one's lack of capacity to form a specific intent. Accordingly, the Seventh Circuit held that a state is not constitutionally compelled to recognize the doctrine of diminished capacity and that the state did not act arbitrarily in excluding expert testimony offered to establish the lack of capacity to form a specific intent.

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<sup>108</sup>*Id.* at 473.

<sup>109</sup>*Id.* at 476.

<sup>110</sup>715 F.2d at 1141.

<sup>111</sup>See *State v. Dalton*, 95 Wis. 2d 398, 298 N.W.2d 238 (1980); *Steele v. State*, 97 Wis. 2d 72, 294 N.W.2d 2 (1980).



The Eleventh Circuit addressed the same issue in *Campbell v. Wainright*.<sup>112</sup> Whereas the Seventh Circuit in *Muench* had been somewhat circumspect concerning the *Chambers*<sup>113</sup> and *Washington*<sup>114</sup> decisions, which had compelled its rejection of the state's blanket exclusion of evidence in *Hughes*,<sup>115</sup> the *Campbell* court concluded outright that those Supreme Court decisions were not controlling. While Florida might not have established the state's justification for excluding psychiatric testimony to the extent that the *Muench* court required, the Eleventh Circuit held that the Florida court's reasoning that the psychiatric evidence was confusing and irrelevant was justification enough.<sup>116</sup>

Two other federal courts have addressed the issue framed in *Fisher*.<sup>117</sup> whether the trial court should instruct the jury that testimony introduced on the issue of insanity should be considered on the issue of specific intent. The Court of Appeals for the D.C. Circuit in dicta in *United States v. Brawner*<sup>118</sup> determined that the jury could consider evidence of mental disease or defect in deciding the issue of specific intent provided there was sufficient scientific support for the testimony and it would be of help to the jury. The Court of Appeals for the District of Columbia, however, declined to follow the *Brawner* dicta in *United States v. Bethea*.<sup>119</sup> Relying on the premise that *Fisher* was valid precedent on the legality of limiting the use of expert testimony in this area, the *Bethea* court weighed the policies behind accepting and rejecting the doctrine of diminished capacity and decided to retain the all-or-nothing defense resulting from mental deficiency.

The Eleventh Circuit in *Campbell*<sup>120</sup> may be correct in its summation that *Hughes*<sup>121</sup> "represents the high water mark in this area, however, and the tide has ebbed."<sup>122</sup> On the other hand, that pronouncement may have been premature.

In the first place, reliance to any great extent on *Fisher*, a 1946 case, could be misplaced. Commentators have suggested that the

<sup>112</sup>738 F.2d 1573 (11th Cir. 1984).

<sup>113</sup>410 U.S. 284 (1973).

<sup>114</sup>388 U.S. 14 (1967).

<sup>115</sup>576 F.2d 1250 (7th Cir. 1978).

<sup>116</sup>738 F.2d at 1584.

<sup>117</sup>328 U.S. 463 (1946).

<sup>118</sup>471 F.2d 969 (D.C. Cir. 1972).

<sup>119</sup>365 A.2d 64 (D.C. 1976).

<sup>120</sup>738 F.2d 1573 (11th Cir. 1984).

<sup>121</sup>576 F.2d 1250 (7th Cir. 1978).

<sup>122</sup>738 F.2d at 1581.

*Fisher* Court was addressing the doctrine of partial responsibility in its first sense—a showing of mental disturbance short of legal insanity that yet entitles the defendant to a reduced finding.<sup>123</sup> While this doctrine overlaps to some degree with the theory that mental disease or defect may affect a person's ability to form a specific intent, the legal analysis is quite different. In *Fisher*, *Bethea*, and *Browner*, the courts concentrated on the authority and responsibility of the state authorities to determine criminal substantive and procedural law. In each of those cases, the law provided an all-or-nothing defense based on insanity, and the reviewing bodies saw no constitutional requirement to recognize a middle-ground affirmative defense.

The problem with this approach is that it does not go far enough in its analysis. Since 1946, when *Fisher* was decided, the Supreme Court has articulated due process requirements that were previously given much less attention. *Leland v. Oregon*,<sup>124</sup> while approving an Oregon statute which required the defendant to establish the defense of insanity beyond a reasonable doubt, noted that the government was nonetheless required to prove beyond a reasonable doubt every element of the crime charged, including any requisite specific intent. In *Re Winship*,<sup>125</sup> also decided after *Fisher*, supports the proposition that the government's burden of proving every essential element is a constitutional due process requirement. *Patterson v. New York*,<sup>126</sup> in which the Supreme Court affirmed a state's statutory requirement that the defendant bear the burden of proving that he acted under extreme emotional disturbance, noted once more that specific intent remained an essential element of the crime. Recent Supreme Court opinions emphasize the prominence of specific intent as an essential element. For example, in *Francis v. Franklin*,<sup>127</sup> the Supreme Court reversed a conviction because deficient instructions may have misled the jury about who held the burden of proving the element of intent.<sup>128</sup>

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<sup>123</sup>Hermann, *Defense of Insanity*, 14 Rutgers L. J. 266-267 and n.7 (1983); see also Morse, *supra* note 72, at 7.

<sup>124</sup>343 U.S. at 790.

<sup>125</sup>397 U.S. at 358.

<sup>126</sup>432 U.S. 197 (1977).

<sup>127</sup>471 U.S. 307 (1985).

<sup>128</sup>See also *Enmund v. Florida*, 458 U.S. 782 (1982) (Imposition of the death penalty was unconstitutional where state law did not require proof that defendant intended or anticipated killing of victims; dissent objected to making intent federal constitutional law).

These decisions, along with *Chambers*<sup>129</sup> and *Washington*,<sup>130</sup> illustrate how critical the element of specific intent is to the government's case and correspondingly the regard with which the Supreme Court views the defendant's right to present evidence.

While *Fisher's* conclusion that the substantive law defining the insanity defense is a matter for local determination may well be sound, it does not necessarily follow that that law is immune from attack on other due process grounds which have since been refined. The Seventh Circuit concluded that the Supreme Court in *Fisher* had addressed and rejected the argument that a defendant has the constitutionally-protected right to present evidence of mental disease or deficit to show lack of specific intent.<sup>131</sup> To the extent the conclusion accurately reflects the *Fisher* decision, the subsequent development of the law in this area suggests that the issue requires careful examination in light of the Supreme Court's more recent opinions. When the Seventh Circuit in *Hughes v. Matthews*<sup>132</sup> framed the issue in terms of the impact of the exclusion on the defendant's right to present evidence, and considered the Supreme Court cases under discussion, it found the exclusion constitutionally infirm. In *Muench*,<sup>133</sup> the same court circumvented the analysis it had applied in *Hughes* on the constitutional question by asserting that the Supreme Court disposed of the issue in *Fisher* when it permitted the state to exclude psychiatric evidence going to lack of specific intent.

While the cases cited<sup>134</sup> strongly suggest that the Supreme Court would at least analyze, if not dispose of, the issue differently today than it did in *Fisher* forty years ago, it is less clear that a given defendant would prevail in a challenge to the exclusion of evidence of mental disease or defect offered to prove lack of specific intent. As the circuit courts in *Wahrlick* and *Campbell* accurately summarized, the holdings in *Chambers* and *Washington* stop short of requiring that a court admit any evidence, even any competent and relevant evidence, that a defendant proffers. On the other hand, the state cannot arbitrarily exclude competent and relevant evidence. Moreover, a procedural rule which infringes upon the constitutional right of a defendant to present evidence in his defense will invite close scrutiny. There are two prongs to the inquiry: (1) Is the evidence competent and

<sup>129</sup>410 U.S. 284 (1973).

<sup>130</sup>388 U.S. 14 (1967).

<sup>131</sup>*Muench v. Israel*, 715 F.2d 1124, 1137 (7th Cir. 1983).

<sup>132</sup>576 F.2d 1250 (7th Cir. 1978).

<sup>133</sup>715 F.2d 1124 (7th Cir. 1983).

<sup>134</sup>See *supra* notes 124-130 and accompanying text.

relevant? and (2) Is there compelling justification to exclude the evidence? Neither prong has a clear-cut answer.

In *Hughes v. Matthews*,<sup>135</sup> the Seventh Circuit applied the following analysis in determining whether the court's exclusion of psychiatric evidence offended the principles established in *Chambers* and *Washington*. It looked first to see if Wisconsin law treated the psychiatric evidence as competent and relevant. It noted, however, that state law would not be dispositive if it arbitrarily determined the evidence not to be competent or relevant.<sup>136</sup> Since Wisconsin law appeared to consider psychiatric testimony as both competent and relevant, the court then analyzed the state's justification for excluding it. In the case before the court, the two justifications offered by the state were (1) the fear that admitting psychiatric testimony for this purpose would result in the defendant's obtaining absolution from criminal responsibility for abnormalities not amounting to insanity; and (2) admitting the testimony would frustrate the purposes of the bifurcated system set up in the state to address insanity. The court found that, in the case before them, neither of these justifications applied: (1) the defendant, if he prevailed on the element of criminal intent would still be criminally culpable for second degree murder; and (2) since the defendant had withdrawn his plea of not guilty by reason of insanity, the trial would not involve bifurcation of the issues. The court did not address whether these justifications, had they been applicable, would serve as a valid basis for the exclusion. After this decision, the Seventh Circuit, in *Muench*, permitted the state to justify the exclusion of psychiatric evidence about specific intent on the theory the state had drawn a valid distinction between applying psychiatric expertise to assist in determining sanity and applying it to assist in determining the lack (or presence) of specific intent. The court accepted the state's determination that the evidence was not relevant and competent for the latter use. It also considered and rejected the contention that the presence of a personality disorder is probative of the defendant's capacity to form an intent.

The circuit courts in *Warhlich*<sup>137</sup> and *Campbell*<sup>138</sup> relied heavily on the determination that psychiatric testimony was not competent. While the Seventh Circuit in *Muench* seemed to require a

<sup>135</sup>576 F.2d 1250 (7th Cir. 1978).

<sup>136</sup>*Id.* at 1256 n.13.

<sup>137</sup>479 F.2d 1137 (9th Cir. 1973).

<sup>138</sup>738 F.2d 1573 (11th Cir. 1984).

basis in state law for such a determination, the Eleventh Circuit explicitly found no need for such a formalistic approach:

In some cases, the failure of a state to articulate an adequate justification for its law will result in the validation of that law—but, in this case, we do not believe Florida must explicitly state the reasons for the rejection of psychiatric/specific intent evidence. The Florida court's reasoning for excluding this evidence is that it would confuse the jury on the insanity issue, for which psychiatric testimony is relevant [citations omitted]. Given the questionable foundation of such evidence, we hold that Florida may simply exclude it as irrelevant without attempting a comprehensive discussion of the subject. *Accord, Warhlich v. Arizona*, 479 F.2d 1137 (9th Cir. 1973).<sup>139</sup>

Interestingly, the Ninth Circuit, in *United States v. Erskine*,<sup>140</sup> determined that the federal district court should have permitted the defendant to produce similar testimony to show lack of specific intent.

There are compelling arguments that much of the psychiatric testimony proffered is not competent and relevant. It is not competent, one might argue, because the state of the science has not progressed to the point that a mental health professional has the expertise to discern what an individual actually formed in his mind prior to a given act. Furthermore, the testimony may not be probative of lack of specific intent: with very few exceptions a mental disease or defect does not interfere with the act of forming a specific intent. The abnormality may well affect why the person formed the intent as in, "The voices directed me to kill"; but the capacity to form the intent is certainly intact.<sup>141</sup> Finally, there is the concern that the testimony tends to be more confusing than informative.

<sup>139</sup>*Id.* at 1583.

<sup>140</sup>588 F.2d 721 (9th Cir. 1978). In *Erskine* no federal statute barred the use of such testimony in federal trials. In the absence of any statute, the court found it "beyond dispute" that a defendant who could rely upon intoxication to support an inability to form a specific intent "could also prove he suffered from some other mental or physiological condition which blocked formation of the requisite intent." 588 F.2d at 722. The court did not require trial judges to admit all psychiatric testimony, however, noting that "the competency and persuasiveness" of particular testimony could be questioned. *Id.* at 723.

<sup>141</sup>*House Hearings*, *supra* note 17 (Statement of Stephen J. Morse, J.D., Ph.D., Professor of Law and Professor of Psychiatry, University of Southern California Law Center and School of Medicine).

Arguments to the contrary are also available. If psychiatry is competent and relevant for use by the courts in deciding such weighty issues as insanity, capacity to be tried, and competence to execute a will, then it is arbitrary to deem psychiatric testimony about the ability to form specific intent as imprecise, speculative, or overly confusing. The dissent in *Muench* as well as at least one commentator considers the fine line between the competence of the psychiatric testimony proffered on insanity and the incompetence of comparable testimony about intent to be a contrivance.<sup>142</sup> In any event state court decisions can be cited for either proposition.<sup>143</sup>

A factor that some courts have found persuasive and others have rejected is the anomalous result that occurs if the exclusion is applied: a defendant may produce evidence to show that intoxication affected his ability to form specific intent, but he is not permitted to present evidence of mental disease which had the same effect.<sup>144</sup>

Proponents of the exclusion of psychiatric testimony not offered in conjunction with the insanity defense should consider that the law requires good reason to support the exclusion. A court in reviewing a challenge will have to demand compelling justification before affirming a mechanically applied practice which infringes upon a constitutionally protected right.<sup>145</sup>

## V. THE EFFECTS OF SIMILAR REFORM ON MILITARY LAW

### A. PROPOSED AMENDMENTS TO THE UNIFORM CODE OF MILITARY JUSTICE

In 1977 the Court of Military Appeals, in *United States v. Frederick*,<sup>146</sup> established the ALI test as the insanity standard applicable to courts-martial. The government presently bears the burden of proving sanity beyond a reasonable doubt once the issue is raised.<sup>147</sup> Military law also incorporates the doctrine of diminished or partial mental responsibility in the sense that the

<sup>142</sup>Morse, *supra* note 72.

<sup>143</sup>See *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

<sup>144</sup>Compare *Erskine v. United States*, 588 F.2d 721 (9th Cir. 1978) and *United States v. Brawner with United States v. Betha*, 365 A.2d 64 (D.C. 1976).

<sup>145</sup>*Chambers v. Mississippi*, 410 U.S. 284; *Washington v. Texas*, 388 U.S. 14.

<sup>146</sup>3 M.J. 230 (C.M.A. 1977).

<sup>147</sup>*United States v. Parker*, 15 M.J. 146 (1983); see also *United States v. Morris*, 20 C.M.A. 446, 43 C.M.R. 286 (1971) and cases cited therein.



defendant could present evidence of mental disease or defect to show lack of requisite specific intent.<sup>148</sup> These provisions are presently included in the Manual for Courts-Martial.<sup>149</sup> A bill that has been sent to Congress as Department of Defense legislation<sup>150</sup> proposed to amend the Uniform Code of Military Justice<sup>151</sup> to incorporate the substantive changes to the insanity defense that now constitute federal law. The proposed bill would insert after section 850 (Article 50) the following new article:

§ 850a. Art. 50a. Defense of Lack of Mental Responsibility.

(a) It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.

(c) Notwithstanding the provisions of section 852 of this title (article 52), the accused may be found not guilty under this defense only if a majority of the members present at the time the vote is taken determines that the defense of lack of mental responsibility has been established.

(d) Subsection (c) does not apply to a court-martial composed of a military judge only. The military judge of such a court-martial shall determine whether the defense of lack of mental responsibility has been established.<sup>152</sup>

The proposed legislation would affect the military justice system in many of the same ways the Insanity Defense Reform Act has changed the federal law: (1) The definition of insanity is narrower; the volitional prong of the ALI definition has been eliminated; (2) the burden of proof by clear and convincing evidence is placed upon the defendant; and (3) the meaning and

<sup>148</sup>See *United States v. Thompson*, 3 M.J. 271 (C.M.A. 1977).

<sup>149</sup>Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 916(k).

<sup>150</sup>See *supra* note 4; *infra* Appendix.

<sup>151</sup>10 U.S.C. §§ 801-940 (1982).

<sup>152</sup>See *infra* Appendix.

effect of the language, "Mental disease or defect does not otherwise constitute a defense," must be resolved. In addition, the bill adopts a bifurcated voting system by which the panel members vote on guilt or innocence, and, if they determine that the accused is guilty, they then vote on the issue of sanity.<sup>153</sup> There is no provision for a finding other than "guilty" and "not guilty." There is no proposed legislation addressing the disposition of the soldier who prevails on the sanity issue.

### **B. TESTIMONY ABOUT SPECIFIC INTENT**

To the extent that changes in the law depend upon prior case law for interpretation, military case law in many respects is more fully developed than in the federal system and may provide guidance to the courts. For example, if the question of the competency or relevancy of expert psychiatric testimony is placed in issue for purposes of a *Chambers* analysis, military law in the area provides at least a point of departure. In *United States v. Vaughan*,<sup>154</sup> the Court of Military Appeals held that the defense of lack of capacity to entertain a specific intent applied to the offense of unpremeditated murder. The court acknowledged its respect for the "advances in modern psychiatry [which] have enabled an accused's mental condition to be more accurately diagnosed."<sup>155</sup> On the other hand the Army Court of Military Review, in *United States v. Michaud*,<sup>156</sup> noted, "This Court recognizes that psychiatry is an inexact science and psychiatric testimony must be closely scrutinized."<sup>157</sup> The government will be hampered in any attempt to justify a blanket exclusion, since the military courts, having long applied the theory of diminished capacity, routinely treat psychiatric expert testimony on the issue of specific intent as competent and relevant. If military law adopts the position that the legislation does not bar the use of psychiatric testimony to show lack of specific intent, then military courts-martial will continue to consider this type of evidence in accordance with the applicable rules of evidence.<sup>158</sup>

<sup>153</sup>The Joint Services Committee on Military Justice is proposing that the panel vote first on guilt or innocence and then on sanity. Telephone interview with Lieutenant Colonel Gary Casida, U.S. Army, member of the Joint Services Comm. on Military Justice (March 5, 1986).

<sup>154</sup>23 C.M.A. 343, 49 C.M.R. 747 (1975); see also *United States v. Kunak*, 5 C.M.A. 346, 17 C.M.R. 346 (1954).

<sup>155</sup>23 C.M.A. at 344, 49 C.M.R. at 748.

<sup>156</sup>2 M.J. 428 (A.C.M.R. 1975).

<sup>157</sup>*Id.* at 432.

<sup>158</sup>Mil. R. Evid., Section IV.

### C. "WRONGFULNESS" INSTEAD OF "CRIMINALITY"

Another issue which may lead to litigation is the effect of substituting the word "wrongfulness" for "criminality" in the definition of insanity. The ALI test as set out in the Model Penal Code<sup>159</sup> did not differentiate between the two terms: "wrongfulness" is included in brackets as an alternative to "criminality," but no preference is suggested. The *M'Naughten*<sup>160</sup> test, which utilized "wrong," sparked discussion largely unresolved in this country on whether the term referred to "legal" or "moral" wrong.<sup>161</sup> The state courts which have addressed the issue have reached various conclusions.<sup>162</sup> In addition, the states that have adopted the ALI test have split in using "wrongfulness" or "criminality."<sup>163</sup> Semantically, one can draw a distinction between "wrongfulness" and "criminality" in that the latter connotes a legal wrong as opposed to a moral wrong. Arguably a defendant could comprehend that the offending act was legally wrong, i.e., criminal, without appreciating that it was morally wrong—thinking, for example, as a result of a delusion that it was morally justified. Several of the circuit courts adopted a "wrongfulness" standard in order that such an individual would not be held criminally culpable for his act.<sup>164</sup> The Court of Military Appeals in *Frederick*, however, adopted the word "criminality."<sup>165</sup>

If a defendant possesses substantial capacity to both appreciate the criminality of his conduct and to conform his conduct to the law, he should not escape criminal responsibility because his personal moral code is not violated. Contrarily, if his delusion is of such a nature that he believes his otherwise criminal act is not criminal, he will not be held responsible.<sup>166</sup>

<sup>159</sup>Model Penal Code § 4.01 (Tent. Draft No. 4, 1955).

<sup>160</sup>See *supra* note 14.

<sup>161</sup>See LaFave, *supra* note 80, at 278.

<sup>162</sup>Compare *State v. Andrews*, 187 Kan. 458, 357 P.2d 739 (1961) with *People v. Schmidt*, 216 N.Y. 324, 110 N.E. 945 (1915).

<sup>163</sup>See Annot., 9 A.L.R. 4th 526 (1981 and Supp. 1985) for a list of the test applied by state.

<sup>164</sup>See, e.g., *Wade v. United States*, 426 F.2d 64, 71 n.9 (9th Cir. 1970); See also Weihofen, *Capacity to Appreciate "Wrongfulness" or "Criminality" under ALI Model Penal Code Test of Mental Responsibility*, 58 J. Crim. L., Criminology & Police Sci. 27 (1967); Annot., 56 A.L.R. Fed. 326 (1982).

<sup>165</sup>3 M.J. at 237.

<sup>166</sup>*Id.* at 238.

If Congress passes the proposed amendment to the Uniform Code of Military Justice, a military defendant may try to use this language from the *Frederick* opinion to argue that if he can persuade the fact finder that the act did not violate his personal moral code, then the fact finder must acquit him. The distinction between "criminality" and "wrongfulness" can be expressed as the distinction between "legal wrongfulness" and "moral wrongfulness".<sup>167</sup> Presumably the latter applies since the reason for using "wrongfulness" instead of "criminality" is to make that precise distinction.<sup>168</sup>

Clearly, the substitution of "wrongfulness" for "criminality" does not mandate this result. The argument examines the meaning of the terms out of context when the context is critical. While the legislative history of the Insanity Defense Reform Act does not address the meaning of "wrongfulness," it is apparent from the tenor of the hearings that this legislation was in no manner intended to expand the availability of the insanity defense.<sup>169</sup> Regardless which word is applied, the insanity standard requires that the lack of appreciation result from mental disease or defect. An individual's personal morality will not come within the definition unless the aberrant view is the result of the disease/defect.

### D. TRIAL CONSIDERATIONS

The use of expert psychiatric testimony will continue to be critical to the insanity defense. The narrower definition and the limitations on the scope of expert testimony will require counsel on both sides of the issue to structure carefully the evidence they seek to elicit. All counsel need to pay close attention to the relevance of the testimony: (1) the side proffering, in order to avoid, if not confusion, loss of attention; and (2) the opposing side, in order to keep the panel from being overwhelmed by medical jargon. Clearly, the rules of evidence may preclude opinions encompassing the ultimate issue. Such questions as, "In your opinion, doctor, could the accused appreciate the quality or wrongfulness of his acts?" would be impermissible under the amended federal rule.<sup>170</sup> A qualified witness, however, may describe the results of his examination, the presence (or absence)

<sup>167</sup>See *United States v. McGraw*, 515 F.2d 758 (9th Cir. 1975).

<sup>168</sup>See, e.g., *United States v. Wade*, 426 F.2d 64 (9th Cir. 1970).

<sup>169</sup>See *supra* notes 11-15 and accompanying text.

<sup>170</sup>Fed. R. Evid. 704(b). The Military Rules of Evidence permit expert psychiatric testimony on the ultimate issue of the accused's mental state. Exec. Order No. 12550, 51 Fed. Reg. 6497 (1986).

of a disease or defect, the basis for the diagnosis, and the effects on the accused's thinking processes. He may also discuss the difference between "know" and "appreciate" in a manner which would assist the trier of fact. If carefully framed, questions about the effect of the mental abnormality on an afflicted individual's ability to appreciate the nature or quality or the wrongfulness of his acts should be permissible.

Part of the rationale behind excluding expert opinion testimony encompassing the ultimate issue was the concern that the fact finders would be unduly influenced by such a conclusion coming from an "expert" in the field. Excluding such testimony, however, may not necessarily strengthen the government's position. In some instances, the exclusion may be more beneficial to the defense than to the government. The opinion of an expert that the accused did or could appreciate the quality or wrongfulness of his acts can topple a carefully constructed defense derived from an undisputed mental condition which by its nature may sound quite debilitating. In a close case experts from both sides will agree that the accused suffers from a severe mental disease or defect. The issue is the effect the mental condition had on the accused's thinking processes. The amended rule of evidence not only precludes testimony from the defense expert that the defendant could not appreciate the quality or wrongfulness of his acts, but also precludes the testimony of the government's expert to the contrary. It can thereby make it very difficult for the government to rebut the implication that the mental condition affected the defendant's ability to appreciate the quality or wrongfulness of his acts, particularly when both experts agree that there is a mental disability.

The opponent of the evidence should focus on two concepts: area of expertise and probative value. Psychiatric testimony that does not satisfy these requirements may be excluded. It is important to distinguish between medical and legal concepts. Psychiatrists presumedly are not expert in the latter, and proper objection might effectively curtail the breadth of the testimony.<sup>171</sup> This theory provides an alternative basis for excluding testimony on the ultimate issue.<sup>172</sup> While "insanity" is strictly a legal concept with no medical significance,<sup>173</sup> what about "specific intent"? The government counsel may be equally successful in

<sup>171</sup>Mil. R. Evid. 702.

<sup>172</sup>Mil. R. Evid. 704 does not presently include the change to Fed. R. Evid. 704. Executive Order 12550 (February 19, 1986).

<sup>173</sup>Morse, *supra* note 72, at 48.

challenging expert psychiatric testimony proffered to show lack of specific intent through the challenge that the testimony is outside the scope of the witness's expertise as by invoking a blanket exclusion. Such a challenge would at any rate force the proponent to establish a foundation for the assertion. Some commentators question the existence of this type of expertise.<sup>174</sup>

A related method of limiting the testimony appearing under the guise of psychiatric expertise is to challenge the probative value of the evidence. Again, this could provide a successful objection to the introduction of expert testimony about specific intent.<sup>175</sup> In *United States v. Kepreos*,<sup>176</sup> the First Circuit affirmed the trial court's exclusion of expert testimony proffered to show that the defendant's physical and psychological difficulties adversely affected his ability "to attend to subtle details in his surroundings and to draw conclusions therefrom."<sup>177</sup> The court applied Federal Rule of Evidence 403 and found the "psychiatric testimony to be both misleading and of questionable utility."<sup>178</sup> It also noted the broad discretion that district courts have under that rule. The argument is equally applicable to military practice.<sup>179</sup>

Another possible challenge to the type of expert psychiatric testimony on which the defense frequently capitalizes is to object to the relevance of the defendant's medical diagnosis. The following argument, though aimed at the lack of relevance of the diagnosis to the issues of specific intent and partial responsibility, applies also to testimony about insanity in general:

First and more important, diagnoses are irrelevant in both mens rea and partial responsibility cases because they will not help the fact finder assess the legal issue that is properly before it. As I have already tried to show, the real issue is either whether mens rea was formed in fact or the moral and legal question of whether the defendant was less responsible because his contact with reality or self control was impaired at the time. . . . [K]nowing whether a defendant suffers from a particular mental disorder according to the currently fashionable diagnostic nomenclature is of no use in a courtroom

<sup>174</sup>Arenella, *supra* note 72, at n.33 and accompanying text at 833.

<sup>175</sup>Mil. R. Evid. 403. See *House Hearings*, *supra* note 17 (statement of Stephen A. Morse, Professor, University of Southern Law Center).

<sup>176</sup>759 F.2d 961 (1st Cir. 1985); see also *United States v. Byers*, 730 F.2d 568 (9th Cir. 1984).

<sup>177</sup>*Id.* at 964.

<sup>178</sup>*Id.*

<sup>179</sup>Mil. R. Evid. 403.



in assessing whether *mens rea* was formed or the validity of partial responsibility. The issue is not whether the defendant suffers from schizophrenia or another disorder; it is whether the legal criterion is met.<sup>180</sup>

Professor Morse, the author of this passage, asserts also that prohibiting testimony of diagnosis will avoid jury confusion and the tendency to place undue importance on the label.<sup>181</sup>

The counter-argument is that the label assists the jury in giving structure to the testimony. Since the concept of mental disease or defect is central to the definition of insanity, the witness should be permitted to describe it by name; otherwise the fact finder may mistake the condition for no more than an unrelated aggregate of symptoms.

These are only a few examples of how vigilance in the courtroom can help keep expert testimony in this area within reasonable bounds. While counsel each have the usual adversarial interests in monitoring the opposing party's witness, the heaviest burden is probably upon the judge. Expert psychiatric testimony may be subject to unique limitations and the lines between the admissible and inadmissible can be indistinct.

The complexity of the issues magnifies the judge's responsibilities in giving instructions. If testimony about wrongfulness has been confusing, the judge is responsible for providing the appropriate standard.<sup>182</sup> He must distinguish between the sanity determination with the burden of proof by one standard (clear and convincing evidence) on the defendant and the determination of guilt or innocence on the merits. The panel has to understand that proof of the latter by a different standard (beyond a reasonable doubt) remains the burden of the government. To further complicate matters, in offenses involving specific intent, extra care must go to differentiating that element from the question of sanity. The delivery of lucid instructions may provide the ultimate challenge in an insanity defense.

## VI. THE PROPOSED BIFURCATED VOTING PROCEDURE

The proposed amendment to the Uniform Code of Military Justice includes the following provision within § 850a.

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<sup>180</sup>Morse, *supra* note 72, at 51.

<sup>181</sup>*Id.* at 53.

<sup>182</sup>See *United States v. McGraw*, 515 F.2d 758 (9th Cir. 1975).

(c) Notwithstanding the provisions of 852 of this title (article 52), the accused may be found not guilty under this defense only if a majority of the members present at the time the vote is taken determines that the defense of lack of mental responsibility has been established.<sup>183</sup>

Apparently the drafters anticipate a bifurcated vote on findings. Bifurcated proceedings are not uncommon to state law when the sanity of the defendant is at issue. The insanity issue may be determined before or after the trial on the merits, and even by a different jury.<sup>184</sup> What is unique to the military system is that the sixth amendment right to trial by jury does not apply to courts-martial. There are, however, constitutional limits to court-martial procedures.<sup>185</sup> To justify a deviation from other constitutionally-mandated standards, the government has to show that military conditions require a different rule.<sup>186</sup>

Because anomalous results could flow from the procedure that has been proposed, a challenge is inevitable. As an example, consider a panel of twelve members. According to the proposal, the panel members first vote on the issue of guilt.<sup>187</sup> If eight members vote guilty, the panel then votes on whether the defendant has met the burden of proving his lack of sanity by clear and convincing evidence. If six members vote that he is sane, the defendant is convicted of the offense. Between the two votes, however, the defendant may be found guilty with as few as two members of the panel persuaded that he both is sane and committed the offense. The procedure may be compared to taking independent votes on each of the separate elements of an offense and convicting if on each vote there were two-thirds votes cast in favor of conviction. Such a voting system offends the underlying concept that each vote for guilt indicates that the individual fact finder is persuaded beyond a reasonable doubt that every element has been proven.

The case of *United States v. Gipson*<sup>188</sup> takes this principle a step farther. Gibson was charged under a single count with transporting, selling, or receiving a stolen vehicle. The judge instructed that if each juror was satisfied that Gibson had committed any of the acts, though not necessarily the same act,

<sup>183</sup>See *infra* Appendix.

<sup>184</sup>LaFave, *supra* note 80, at 315.

<sup>185</sup>See *Kauffman v. Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969).

<sup>186</sup>*Courtney v. Williams*, 1 M.J. 267 (C.M.A. 1976).

<sup>187</sup>See *supra* note 153.

<sup>188</sup>553 F.2d 453 (5th Cir. 1977).

then they would have reached a unanimous finding of guilty. The Fifth Circuit reversed the conviction because of the possibility that the jurors disagreed about which act supported the conviction. The court concluded that the procedure violated the defendant's right to a unanimous jury verdict. Analogously, the proposed military voting procedure may deny the court-martial defendant his right to the two-thirds vote required for conviction.<sup>189</sup>

A questionable premise behind the proposed procedure is that the requirement that the defendant sustain the burden of proving his lack of mental responsibility translates by some implied mathematical formula into a requirement that a majority of the individual panel members vote that he is insane. This method is oversimplified in its formalistic approach to the new insanity standard. While lacking the mathematical precision of the proposed procedure, a more reasonable application (though fraught with the difficulties inherent in setting different burdens on different parties) would be to require for conviction that two-thirds of the panel members are convinced both of the defendant's guilt and his sanity. The burden of proof and the standard of persuasion would relate only to each panel member's individual deliberation process, not to the arbitrary measurement of an aggregate vote. A New Jersey court in addressing a related issue noted:

The court is aware that the burden of proof has no relevance to the required number of jurors who must agree on a verdict. The burden of proof generally refers to the quantity and/or quality of the evidence and not the number of jurors who must be swayed by the evidence.<sup>190</sup>

Yet, the converse is precisely the assumption underlying the proposed voting procedure.

While not directly applicable, civilian law may assist in the analysis of the constitutionality of the proposed bifurcated voting procedure. Proponents may turn to 1927 legislation in California. The law, which remained in effect for the next twenty years, provided for a bifurcated system in which, among other things, the defendant could be tried either by the same or different juries

<sup>189</sup>The proposed bill would allow a conviction if no more than half the panel members find the accused insane, notwithstanding that UCMJ art. 52 requires that two-thirds of the panel members concur that the defendant is guilty to support a conviction. See *infra* Appendix.

<sup>190</sup>*State v. Pennington*, 131 N.J. Super 1, 3, 328 A.2d 44, 46 (Sup. Ct. Law Div. 1974).

in the discretion of the trial court.<sup>191</sup> A due process challenge to the bifurcation of the issues in general withstood challenge in *People v. Troche*.<sup>192</sup> The California Supreme Court rejected Troche's contention that the court deprived him of due process by excluding proof of his mental state in the trial of his guilt. The court's analysis was essentially that "the words 'due process of law' merely mean law in its regular course of administration, according to prescribed forms and in accordance with general rules for the protection of individual rights."<sup>193</sup>

In *People v. Leong Fook*,<sup>194</sup> the court rejected a contention that the bifurcation subjected the defendant to double jeopardy. The court reasoned in *Leong Fook*, as it had in *Troche*, that the two proceedings were merely phases of a "single trial." While the issue of different juries had not yet arisen, the "single trial" theme is important in assessing the court's analysis when two juries were involved.

The court stood behind the theory when addressing cases which because of deadlock on the issue of insanity were tried by two separate juries.<sup>195</sup> In *People v. Messerly*, the court explained, "[w]hen there has been a failure of trial by disagreement of the jury, the status is the same as if there had been no trial."<sup>196</sup> Colorado applied a similar analysis in *Leick v. People*.<sup>197</sup>

A bifurcated procedure may generally satisfy due process requirements, and the foregoing discussion provides examples of systems which survived attack—at least to the level of review sought. The legal analysis, relying as it does on what is surely the fiction of a single trial when applied to determinations by separate juries, is fragile at best. A sound basis for a law which permits not only bifurcation, but also trial by two separate juries is necessary if the procedure proposed for bifurcating the issues by vote in courts-martial is to pass constitutional muster. Bifurcation of the issues before the same civilian jury is not analogous when the requirement of unanimity on the insanity issue, upon which *Troche* explicitly relied, precludes the possibility that the defendant could be convicted when as few as

<sup>191</sup>Louisell and Hazard, *Insanity as a Defense: The Bifurcated Trial*, 49 Cal. L. Rev. 805 (1961).

<sup>192</sup>206 Cal. 35, 273 Pac. 767 (1929).

<sup>193</sup>206 Cal. at 42, 273 Pac. 767, 770.

<sup>194</sup>206 Cal. 64, 273 Pac. 779 (1928).

<sup>195</sup>*People v. Farslan*, 214 Cal. 396, 5 P.2d 893 (1932); *People v. Messerly*, 46 Cal. App. 2d 718, 116 P.2d 781 (Dist. Ct. App. 1941).

<sup>196</sup>46 Cal. App. 2d at 721, 116 P.2d at 783.

<sup>197</sup>136 Colo. 536, 322 P.2d 674 (1958).

one-sixth of the jurors agree that he is guilty and sane. The *Troche* requirement for unanimity was affirmed as recently as 1974 by the California Court of Appeal in *People v. Bales*.<sup>198</sup> The court noted, however, that the requirement was not constitutionally mandated.

A California court summed up the problem with the voting procedure that has been proposed:

Insanity is merely a separate defense to the charge of a crime. It is therefore necessary that the jury shall unanimously determine the merit of a defense of insanity like any other defense to an alleged crime before the accused person may be found guilty of the offense with which he is charged. . . . In support of the rule requiring an unanimous verdict on the issue of insanity imposed in a criminal action, it has been frequently held that the procedure prescribed . . . requiring separate hearings before the same or different juries upon the crime with which the defendant is charged and upon the special defense of insanity are, in effect, but one and the same trial. . . . It is inconsistent to hold that an unanimous verdict is required on certain issues of a criminal case, and that a valid verdict affecting another issue of the same case may be rendered by the concurrence of a lesser number of the jurors.<sup>199</sup>

Although due process may not require unanimity, a departure that substantially affects the threshold for a conviction to the detriment of the defendant has serious constitutional implications. The Supreme Court, in *Johnson v. Louisiana*,<sup>200</sup> held that a nine-to-three vote was consistent with the requirement that proof be beyond a reasonable doubt, but Justice Powell in his concurring opinion indicated that a lesser ratio might lead to a different result.<sup>201</sup>

## VII. THE MILITARY DEFENDANT WHO IS ACQUITTED BY REASON OF INSANITY

Conspicuously absent from the proposed legislation are any provisions for managing the defendant who has been acquitted by

<sup>198</sup>38 Cal. App. 3d 354, 113 Cal. Rptr. 141 (Ct. App. 1974).

<sup>199</sup>*People v. Chamberlain*, 55 P.2d 240, 242, *superseded in* 7 Cal. 2d 257, 60 P.2d 299 (Dist. Ct. App. 1936) (citations omitted).

<sup>200</sup>406 U.S. 356 (1972).

<sup>201</sup>*Id.* at 366-380 (Powell, J., concurring).

reason of insanity. Most of the problems that moved Congress to reform this area of the law apply when a service member prevails with an insanity defense.<sup>202</sup> Since the only verdicts are "guilty" and "not guilty," any commitment procedures will be according to a higher standard of persuasion with the state bearing the burden. It may be, in the case of a soldier, more difficult to persuade the local civilian authorities to take an interest in an individual who is basically transient to the area. The only significant difference between the relationship of the acquitted soldier and that of his civilian counterpart to their respective systems of justice is that following trial the soldier remains under military control. Thus, there is a mechanism for continued control in place in the military system where none existed for the federal civilian acquittee. Unfortunately, the law takes no advantage of the military system's inherent authority in this regard. The Army can either retain him on active duty (rather unlikely under the circumstances) or separate him from military service. The focus of the pertinent Army regulations<sup>203</sup> is the severance of control. A commander who takes an interest might alert the local authorities, but there is no requirement or particular mechanism for notification. Consequently, in the case of a soldier acquitted by virtue of insanity, all the criticisms leveled at the federal system prior to the Insanity Defense Reform Act apply with the additional aggravation that upon discharge the individual can appear in a totally unsuspecting community.

At a minimum, military law should provide for a finding of not guilty only by reason of insanity. It would occur when fewer than two-thirds of the panel vote for a conviction but enough additional votes to constitute two-thirds would be cast for a finding of not guilty only by reason of insanity. Depending upon the state, a verdict of not guilty by reason of insanity provides the basis for temporary commitment.<sup>204</sup> To the extent the armed services have valid reasons to avoid involvement in civil commitment proceedings, it is difficult to perceive any rationale for not appropriately characterizing the nature of the court-martial verdict. Perhaps it is feared that the characterization would impose a duty on the

<sup>202</sup>See *supra* notes 21-23 and accompanying text.

<sup>203</sup>See Dep't of Army, Reg. No. 635-100, Personnel Separations - Officer Personnel, para. 5-8 (1 August 1982); Dep't of Army, Reg. No. 635-200, Personnel Separations—Enlisted Personnel (5 July 1984); Dep't of Army, Reg. No. 635-40, Personnel Separations—Physical Evaluation for Retention, Retirement, or Separation (13 Dec. 1985).

<sup>204</sup>In *United States v. Jones*, 463 U.S. 354 (1983), the Supreme Court held that an acquittal by reason of insanity was sufficiently probative to justify commitment.



armed services to take other steps to protect the individual or the public. The lawsuits that have been filed against the government and individuals on tort theories should demonstrate that these will occur without an explicit duty to act.<sup>205</sup>

In fact it would not be unduly burdensome for the military services to take some of the measures that have been made law in the federal system. The acquitted soldier is already under the control of a commander. The armed services have the resources, in some regard to an even greater extent than the civilian community, to hold a preliminary commitment inquiry. A military judge could preside over the proceedings. The expert witnesses are likely to be military doctors or government-employed civilians. The same type of coordination between the U.S. attorney's office and an appropriate state hospital which now takes places in federal civilian commitment proceedings would be feasible. Obviously, there are circumstances under which some of these measures would be impracticable, and alternatives could be made available to commanders to allow for such circumstances as when the soldier is overseas or aboard ship. At some point the soldier will be transferred to a location for out-processing where another party could be responsible for making arrangements for any appropriate formal commitment proceedings. At a minimum, since the armed services are not designed to be a social welfare agency, the law could provide that custody of the individual upon discharge is transferred to the Attorney General. In this event the same laws applicable to the civilian acquitted in federal court could apply. While the latter solution has the advantage of not burdening the armed services with yet another administrative procedure, the further removed the process is from the injury, the less interest there is in ensuring that the defendant is adequately evaluated and committed as appropriate. The failure to address the very real problem of the dangerous individual on the loose would be irresponsible and short-sighted. The victims of a dangerous soldier may very well belong to the military community. And when they are innocent members of the civilian population it becomes even more apparent that the military system has been derelict. Ignoring the problem will not make it disappear. A bill addressing other changes having to do with mental responsibility provides an excellent vehicle for the armed services to assume responsibility for those insane individuals who pose a danger.

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<sup>205</sup>See, e.g., *Kohn v. United States*, 729 F.2d 1120 (7th Cir. 1984) (the government had a duty to the family of a deceased soldier to handle the remains in accordance with their religious beliefs).

## VIII. CONCLUSION

In general the federal legislation effecting a revised insanity defense reflects careful consideration of the rights of the defendant while addressing public concern for protection from dangerous individuals, whether they are sane or insane. The law nevertheless has problem areas which will be sources of litigation. Some of these arise simply because the new law takes away some of the benefits defendants raising the defense previously enjoyed. The government no longer bears the burden of proof, and certain defendants will undoubtedly challenge the legality of the change to that effect. Responsible legislation cannot always avoid legal controversy.

Other problem areas arise from ambiguities in the law. For example, it is unclear whether Congress intended a blanket exclusion of psychiatric testimony when it is not offered in conjunction with the insanity defense. Those drafting changes to the military insanity defense should examine these types of problems in the Insanity Defense Act and evaluate whether the government's interests truly require aggressive measures. The more restrictive limitation on the use of expert psychiatric testimony provides an obvious example of an issue which has already precipitated litigation.<sup>206</sup> It would seem imprudent to invite a controversy of constitutional dimension when the rules of evidence can provide adequate control over irrelevant, misleading, or nonprobative testimony.<sup>207</sup>

The changes to the federal law tightening the definition of insanity and shifting the burden of proof to the defendant substantially strengthen the government's position. It is unnecessary to push to the limits of the law for a marginal additional advantage in obtaining a conviction, particularly when the rules of evidence provide a validated method to address many of the government's concerns.

From the government's perspective extended litigation consumes valuable resources and frustrates the administration of discipline regardless of the outcome. When grounds for reversal can be circumvented without compromising the government's interests, the system benefits. The military justice system can best address insanity defense inform by selectively incorporating provisions of the Insanity Defense Reform Act and by interpreting these provisions with caution.

<sup>206</sup>United States v. Frisbee, 623 F. Supp. 1217 (N.D. Cal. 1985).

<sup>207</sup>See, e.g., Mil. R. Evid. 403.

## APPENDIX

### A BILL

To amend chapter 47 of title 10, United States Code, (the Uniform Code of Military Justice), to establish procedures concerning the defense of lack of mental responsibility, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.*

SECTION 2. (a) Subchapter VII of Chapter 47, title 10, United States Code, is amended by inserting after section 850 (article 50) the following new subsection (article):

"§ 850a. Art. 50a. Defense of Lack of Mental Responsibility.

"(a) It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

"(b) The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.

"(c) Notwithstanding the provisions of section 852 of this title (article 52), the accused may be found not guilty under this defense only if a majority of the members present at the time the vote is taken determines that the defense of lack of mental responsibility has been established.

"(d) Subsection (c) does not apply to a court-martial composed of a military judge only. The military judge of such a court-martial shall determine whether the defense of lack of mental responsibility has been established."

(b) The table of sections at the beginning of such subchapter is amended by inserting after the item relating to section 850 (article 50) the following new item:

§ 850a. 50a. Defense of Lack of Mental Responsibility.

# TRADE SECRETS AND TECHNICAL DATA RIGHTS IN GOVERNMENT CONTRACTS

by Captain Donna C. Maizel\*

## I. INTRODUCTION

Delivery of information is the key difference between sales in the open market and sales to the armed services. In the marketplace, the sale of an item involves only the delivery of that tangible item. Sales to the armed forces are different because data must be generated to accompany the item.<sup>1</sup> Accompanying data may include original blueprints, engineering designs, computer programs, operating manuals, or information regarding chemical compositions, component parts, materials, manufacturing processes, and tooling.<sup>2</sup> The data represents the sum total of the manufacturer's knowledge and expertise in producing or manufacturing the military weapons or equipment to be delivered under the contract. A complete technical data package is an instruction guide which would educate any reasonably skilled manufacturer in how to produce an item.

Information, in the context of Government contracting, is a valuable property right. The owner of the right to reproduce and exploit the knowledge might be the concept-developer, the manufacturer, the supplier of funds during development, the deviser of tests to prove the item functions, or the ultimate purchaser of the item. The question of who owns the rights to technical data has never been answered to the satisfaction of all the parties in the

\*Judge Advocate General's Corps, U.S. Army. Currently assigned as Administrative Law Officer, V Corps, Frankfurt, FRG, 1986 to present. Formerly assigned as Branch Chief and Action Attorney, Defense Appellate Division, 1981-1985; Trial Defense Service Attorney, Fort Ord, California, 1979-1981. B.A., California State University, Sonoma, 1974; J.D., Hastings College of Law, University of California, San Francisco, 1978; LL.M., George Washington University, National Law Center, 1985. Completed the Judge Advocate Officer Basic Course, 1979 and the 34th Judge Advocate Officer Advanced Course, 1986. Author of *Urinalysis, The Search and Seizure Aspects*, 14 *The Advocate* 402 (1982); *An Innocent Man, The Accused Who Passes the Polygraph*, *The Army Lawyer*, June 1985, at 66; *Does an Open House Turn a Military Installation Into a Public Forum?* *United States v. Albertini and the First Amendment*, *The Army Lawyer*, Aug. 1986, at 11. Member of the bar of the State of California. This article is based upon a thesis submitted in partial satisfaction of the requirements for completion of the 34th Judge Advocate Officer Graduate Course.

<sup>1</sup>*Hearings on Proprietary Rights and Data Before Subcommittee No. 2 of the House Select Committee on Small Business*, 86th Cong., 2d Sess. 30 (1960) [hereinafter Subcommittee No. 2]; see also R. Nash and L. Rawicz, *Patents and Technical Data* 1 (1983) [hereinafter Nash and Rawicz].

<sup>2</sup>Subcommittee No. 2, *supra* note 1, at 33; Nash and Rawicz, *supra* note 1, at 1.

contracting process. Between 1948 and 1964, technical data rights regulations were completely revised four times<sup>3</sup> in an effort to arrive at an interpretation acceptable to both the Government and defense contractors. Early regulations granted the Government complete access to data, but later revisions conferred increasing power upon contractors to reserve ownership rights in data. After a major revision in the 1964 regulations, which permitted contractors great leeway in preserving rights in data, no major substantive regulatory change occurred for the next twenty years, although minor revisions in procedural aspects of technical data rights protection were implemented.<sup>4</sup> The failure to implement revisions to the regulations did not indicate that agreement had been reached in interpreting technical data rights. The period between 1964 and 1984 saw parties litigating a wide variety of issues relating to technical data rights in bid protests before the General Accounting Office (GAO), actions seeking injunctions and damages in federal district court, and claims adjustments proceedings before the Court of Claims and the Armed Services Board of Contract Appeals. The flurry of litigation produced criteria to measure rights in technical data.

By 1984 a new factor had entered the realm of technical data rights. Public outrage over high prices charged by contractors in spare parts procurement caused Congress to reexamine the field of technical data rights.<sup>5</sup> Congress resolved to break the sole source procurement cycle and introduce greater competition into Government procurement.<sup>6</sup> Congressional efforts to increase competition through the Competition in Contracting Act,<sup>7</sup> the Defense Procurement Reform Act,<sup>8</sup> and the Federal Procurement Competition Enhancement Act<sup>9</sup> included directives to revise technical

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<sup>3</sup>Armed Services Procurement Regulation [hereinafter ASPR] § 9-112 (4 Jan. 1955); ASPR §§ 9.200-9.203 (9 Apr. 1957); ASPR §§ 9.200-9.203 (15 Oct. 1958); ASPR §§ 9.200-9.203 (14 May 1964).

<sup>4</sup>E.g., Defense Acquisition Regulation [hereinafter DAR] § 9-202.3 (1 Mar. 1975).

<sup>5</sup>Hiatt, *Spare Parts Hysteria A Help to Air Force*, Washington Post, Mar. 24, 1986, at A9, col. 1 [hereinafter Washington Post].

<sup>6</sup>H.R. Rep. No. 690, 98th Cong., 2d Sess. 10-14, reprinted in 1984 U.S. Code Cong. & Ad. News 4240-45.

<sup>7</sup>Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175 (codified as amended at Title 10, §§ 2301-2306, 2310, 2311, 2313, 2356, Title 31, §§ 3551-3556; Title 40, § 759; Title 41, §§ 251 note, 252-254, 257-260, 403, 405, 407 note, 414, 416-419 (Supp. III 1985)).

<sup>8</sup>Defense Procurement Reform Act of 1984, Pub. L. No. 98-525, 98 Stat. 2588 (codified as amended at Title 10, §§ 139 note, 139a, 139b, 2301 note, 2302, 2303a, 2305, 2311, 2317-2323, 2354a, 2384, 2384a, 2392 note, 2401-2405, 2411-2416, 2452 note (Supp. III 1985)).

<sup>9</sup>Small Business and Federal Procurement Competition Enhancement Act of 1984, Pub. L. No. 98-577, 98 Stat. 3066 (codified as amended at Title 10, §§ 2302,

data rights regulations. The focus to resolving technical data rights issues has returned to the regulatory arena. Now the pendulum is swinging back to favor Government interests. This article will trace the evolution of regulations implemented in the past and those proposed today, and examine the philosophies which have prompted favoring Government or defense industry interests.

One concept has been viewed as key to a resolution of disputed ownership rights in technical data for the last twenty years. This is the definition of the phrase "developed at private expense." This article will chronicle the attempts of courts, boards and regulatory bodies to define this critical concept and conclude with a prediction of how it will be defined in the future.

## **II. THE CONFLICT: THE DIVERGENT INTERESTS OF THE DEFENSE INDUSTRY AND THE GOVERNMENT IN PROTECTING TECHNICAL DATA**

Private industry has an interest in protecting technical data because maintaining confidentiality permits it to maximize profits. Profits are increased when one company enjoys a competitive advantage over its competitors due to its technical expertise and superior knowledge. On the other hand, losses may occur when a company invests sizable private resources into developing a technical innovation which then falls into the hands of a competitor. The competitor is able to exploit the innovation without having invested in its development and without having to recoup that investment from its sales. Naturally the competitor may then charge less for the same innovation. When technical data is used in competitive reprourement, a contractor's design and engineering drawings are made public by the Government in a solicitation. Trade secrets are revealed to the contractor's competitors. Contractors who sell to the Government want to safeguard their data to prevent exploitation by their competitors and retain a competitive advantage. Above all, the developer of an innovative technical invention wants to maximize sales potential by keeping the technological design data secret. Indeed, the existence of the company itself may depend upon exclusive access

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2303a, 2304, 2310, 2311; Title 15, §§ 637, 644; Title 41, §§ 251 note, 253, 253b-253g, 259, 403, 414a, 416, 418a, 418b, 419 (Supp. III 1985)).



to a trade secret.<sup>10</sup> The most famous trade secret is also one of the oldest. The 100-year-old formula of Classic Coke is known to only two people in the world: two corporate executives who are forbidden to fly on the same airplane together. The need for secrecy is so acute that the company has defied a court order to produce the recipe.<sup>11</sup>

Secrecy is just as important to many technologically progressive companies. These companies fill Government contracts with innovative products that may evolve into new generations of products every two or three years.<sup>12</sup> It is not worth the time and effort to apply for a patent to protect the product for seventeen years. The greater danger to them is that in registering for a patent, the high-tech secret will be disclosed to their competitors. Technological innovations are increasingly important in advanced weapon development. Private industry applies state-of-the-art techniques to produce weapons and equipment which quickly become outdated. The military and private industry interests diverge over the use of technical data containing the secrets of these techniques. Technological breakthroughs occur more rapidly when one designer has access to another's data and can build upon it. The military's interest is in sharing technology to keep costs down and promote further breakthroughs.

The military interest in sharing technology is twofold: to obtain adequate competition in weapons procurement and to counter Soviet advances. If all competitors have access to the same technical data base, no competitor enjoys a built-in advantage so competition is enhanced. If rights to use engineering designs are obtained, the designs can be incorporated into a solicitation for both the initial procurement and for obtaining repair parts. This promotes competition. If only one source has the requisite expertise and technical data to supply an item, the item must be procured on a sole source basis. When sole source is the means of acquisition, prices are inevitably higher.<sup>13</sup> Additionally, if only one source of supply has the data to supply an item, Government interests are harmed when that sole source is unable to produce items of sufficient quantity or quality.

Although competition is important to keep prices from needlessly escalating and to assure that supplies will be available, a

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<sup>10</sup>Schiffres and Bronson, *Businesses Struggle to Keep Their Secrets*, U.S. News & World Rep., Sept. 23, 1985, at 59.

<sup>11</sup>*Id.*

<sup>12</sup>*Id.*

<sup>13</sup>See generally H.R. Rep. No. 690, *supra* note 6, at 12-14.

more compelling reason to share technological breakthroughs is to keep pace with Soviet advances. Major General (MG) Richard Kenyon, Army assistant deputy chief of staff for research, development and acquisition, estimates that the Soviet army is twice as large as ours, and the Soviets spend twice as much as we do for research and development. To counter Soviet combat effectiveness, MG Kenyon believes American research and development must stress "fielding new equipment quickly, advancing our technological base development, adjusting our tactics with new developments, and coordinating efforts with our defense industry."<sup>14</sup>

The need to quickly develop weapons to counter Soviet advances speaks to the need to share technological data. Finding the correct technical solution for problems as they emerge is possible only by having access to prior solutions, and perhaps more importantly, by knowing which avenues are dead-ends. The conflict of national security and public interest against the interest of private industry in confidentiality gives rise to the need to regulate technical data rights.

### III. TRADE SECRETS IN GOVERNMENT CONTRACTS

#### A. CLASSIFICATION OF INFORMATION

Knowledge and expertise in the context of Government contracts can be classified as information falling into one of three categories: data which is public knowledge, data which is protected by patent or copyright, and data which is a trade secret.<sup>15</sup> Public knowledge encompasses matters which are in the public domain—the accepted trade practices and customary ways of doing things. Similarly, matters protected by copyright and patent are known to the public, but the holder of the patent receives a monopoly for seventeen years for the use of the invention.<sup>16</sup> Thus, the technical data required to manufacture the item is registered<sup>17</sup> and when the patent expires the data becomes part of the public domain.<sup>18</sup> The salient characteristic of a trade

<sup>14</sup>Kenyon, *Innovation and Creativity in Army R&D*, Army RD&A, Jan.-Feb. 1985, at 23.

<sup>15</sup>Subcommittee No. 2, *supra* note 1, at 33.

<sup>16</sup>35 U.S.C. § 154 (1982).

<sup>17</sup>35 U.S.C. § 112 (1982).

<sup>18</sup>*See United States v. Dublier Condenser Corp.*, 289 U.S. 178, 187 (1933), which states that full and adequate disclosure of patented inventions is necessary so that the public may practice the invention without restriction and profit by its use at the end of the 17-year period.

secret is the degree of confidence in which it is held. A trade secret is a property right in information which has value only as long as it is held in confidence. Once a trade secret is disclosed to others the information's value is greatly reduced.

## **B. CHARACTERISTICS OF A TRADE SECRET**

### *1. Limited Rights in Technical Data.*

Protectable property rights in Government procurement are not defined as trade secrets, but they share many of the same characteristics. The term employed in the Government procurement context, technical data, is defined as "recorded information, regardless of form or characteristic, of a scientific or technical nature."<sup>19</sup> Assertion of limited rights in technical data is tantamount to a declaration that the information is a trade secret and many of the same principles apply. The data must be unpublished and confidential.<sup>20</sup> The data may not be in the public domain or be data which has been or is normally released by the contractor.<sup>21</sup> If data has been made public then limited rights in the data may not be asserted. These restrictions mean that limited rights in technical data must be in the nature of a trade secret. Although the regulations do not define trade secrets, a definition may be gleaned from examining the term in other contexts.

### *2. As Defined by Restatement, Torts.*

An exact definition of a trade secret is not possible, but the most comprehensive definition is in Restatement, Torts (1939).<sup>22</sup> Treatment of trade secrets was omitted from Restatement of Torts, 2d, on the grounds that trade secret coverage fell outside traditional tort law and was more properly included under the law of unfair competition and trade regulation. The 1939 definition has nevertheless been adopted by numerous state and federal circuit courts:<sup>23</sup>

*Definition of trade secret.* A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or pre-

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<sup>19</sup>DAR § 201(b) (1 July 1976).

<sup>20</sup>DAR § 9-202.2(c) (15 May 1981).

<sup>21</sup>DAR § 9-202.2(b)(6) (15 May 1981).

<sup>22</sup>Restatement of Torts § 757 comment b (1939).

<sup>23</sup>R. Milgrim, *Milgrim on Trade Secrets*, §§ 2.01-.09 (1985).

serving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business (see § 759) in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or for bringing out a new model or the like. A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods as, for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as codes for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.<sup>24</sup>

Secrecy and novelty are both factors to be evaluated in arriving at a trade secret classification. Factors to be considered in evaluating the secrecy elements are: the extent to which the information is known outside of one's business; the extent to which it is known by employees and others involved in one's business; the extent of measures taken to guard the secrecy of the information; the value of the information to the owner and to its competitors; the amount of effort or money expended in developing the information; the ease or difficulty with which the information could properly be acquired or duplicated by others.<sup>25</sup>

The novelty requirement is not rigorous. The secret may consist of a "process which is clearly anticipated in the prior art or one which is merely a mechanical improvement that a good mechanic can make."<sup>26</sup>

### 3. *As Defined in Proposed Uniform State Law*

The Uniform Trade Secrets Act,<sup>27</sup> approved by the American Bar Association in February 1980, provides the following definition:

"Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

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<sup>24</sup>Restatement of Torts, § 757 comment b (1939)

<sup>25</sup>*Id.*

<sup>26</sup>*Id.*

<sup>27</sup>14 U.L.A. 537 (1980).

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>28</sup>

#### 4. As Defined By the United States Supreme Court

The Supreme Court, in *Kewanee Oil Corp. v. Bicron Corp.*,<sup>29</sup> compared trade secret protection to patent protection in the course of concluding that federal patent law did not preempt state trade secret protections.<sup>30</sup> Patents are limited to a "process, manufacture, or composition of matter, or . . . improvement thereof" which fulfills the three conditions of novelty, utility and nonobviousness.<sup>31</sup> The standards for the issuance of a patent are rigorous, but if a patent is granted the right of exclusion goes to independent creation as well as to copying the invention.<sup>32</sup>

Trade secrets are discoveries, not inventions, and discovery is less than an invention. The discovery need not be unique, but must be to some degree novel. Knowledge which is not novel is generally known, because that which does not possess novelty is usually known to a sufficient number of people to qualify as being in the public domain.

The Supreme Court stated that the protection accorded the trade secret holder is against improper disclosure or unauthorized use of the trade secret. The Court viewed trade secret protection as weaker than that accorded by patents:

While trade secret law does not forbid the discovery of the trade secret by fair and honest means, e.g., independent creation or reverse engineering, patent law operates "against the world," for whatever purpose for a significant length of time . . . Where patent law operates as a barrier, trade secret law functions relatively as a sieve.<sup>33</sup>

<sup>28</sup>*Id.* at § 1(4). The proposed act was recommended for enactment in all states. R. Milgrim, *supra* note 23, details the state by state variations in the Act.

<sup>29</sup>416 U.S. 470 (1974).

<sup>30</sup>*Id.* at 476-77.

<sup>31</sup>*Id.* at 476.

<sup>32</sup>*Id.* at 478.

<sup>33</sup>*Id.* at 490.

### ***C. FACTORS CAUSING DATA TO LOSE TRADE SECRET STATUS***

#### ***1. Information in the Public Domain.***

Trade secrets have no expiration period. But if independent invention, accidental disclosure, or reverse engineering deliver the data to a competitor, there is no right of exclusion.<sup>34</sup> The subject matter must be secret, not public knowledge and not a matter of general knowledge in the trade or business.<sup>35</sup> The confidence is not lost if the trade secret is revealed under an obligation not to disclose it, such as disclosure to an employee or licensee. If discovered independently, two parties may share the same trade secret.<sup>36</sup>

Knowledge which is a common shop practice does not possess that degree of novelty to permit classification as a trade secret. A combination of known practices in a novel manner might be accorded protection. An alleged trade secret made up of a series of steps constituting common shop practice may be denied limited rights protection if placing the steps in combination involved no great effort, even though knowledge that the combined process works will benefit others.<sup>37</sup>

#### ***2. Reverse engineering.***

The Government may purchase commercially available items and supply the items as Government-furnished property to other contractors for reverse engineering purposes as long as protected data does not accompany the item. A tangible item sold to the Government for test and evaluation purposes can be used as a sample in a request for quotations seeking purchase of greater quantities of the item.<sup>38</sup>

Processes independently discovered by the Government or another firm are not protected against disclosure by the Government.<sup>39</sup> Of course, when the Government already possesses the trade secrets of a contractor, it would be difficult to prove that the discovery by another Government agency was independent. The same difficulty would not bar the use of data independently generated by an outside source. The Government may even use

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<sup>34</sup>*Id.* at 476.

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

<sup>37</sup>Comp. Gen. Dec. B-187051 (15 Apr. 1977), 71-1 CPD para. 262.

<sup>38</sup>Comp. Gen. Dec. B-216236 (11 Dec. 1984), 84-2 CPD para. 649.

<sup>39</sup>*Ferroline Corp. v. General Aniline and Film Corp.*, 207 F.2d 912 (7th Cir. 1953).



the trade secret drawings in its possession for comparison purposes with the independently-generated data.<sup>40</sup>

Reverse engineering is complicated when comparison of specifications will not reveal a match and testing procedures must be implemented. When brand name or equal supplies<sup>41</sup> are solicited, or replacement parts sought,<sup>42</sup> unapproved sources may qualify their products under suitable testing procedures. The Government will not undertake the expense of running tests for comparison purposes when reverse engineering or independent discovery is claimed by a contractor.<sup>43</sup>

### 3. *Use of Proprietary Data By Third Parties.*

The use of proprietary data by a competitor is a breach of confidentiality, but the GAO will not consider under its bid protest procedures a claim that a competitor has wrongfully appropriated another's proprietary data.<sup>44</sup> GAO will not become involved in private party disputes. When a protestor claims that proprietary data was wrongfully transferred by former employees, this is again a private party dispute which GAO will not decide.<sup>45</sup>

### 4. *Inadvertent Disclosure By Government Employees.*

When the Government has wrongfully disclosed data to describe the Government's requirement in a solicitation, GAO will sometimes order cancellation of the solicitations and recommend that award be made to the owners of proprietary data on a sole source basis, particularly if the contract has not yet been awarded.<sup>46</sup> But when the Government inadvertently discloses technical data, the confidentiality requirement has not been wrongfully breached and no corrective action will be taken. Furthermore, GAO will not decide asserted violations of the Trade Secrets Act, because there is a need for judicial determination of

<sup>40</sup>48 Comp. Gen. 605, 607 (1969).

<sup>41</sup>Comp. Gen. Dec. B-192579 (3 Apr. 1979), 79-1 CPD para. 229.

<sup>42</sup>Comp. Gen. Dec. B-199937 (2 Oct. 1981), 81-2 CPD para. 270.

<sup>43</sup>Comp. Gen. Dec. B-299505 (22 Sept. 1983), 83-2 CPD para. 359; Comp. Gen. Dec. B-206879 (29 Oct. 1982), 82-2 CPD para. 383.

<sup>44</sup>Comp. Gen. Dec. B-215028 (30 Nov. 1984), 84-2 CPD para. 589; Comp. Gen. Dec. B-211789 (23 Aug. 1983), 83-2 CPD para. 242; Comp. Gen. Dec. B-209485 (25 July 1983), 83-2 CPD para. 121; Comp. Gen. Dec. B-207213, B-207256, B-207256.2, B-207257, B-207295, B-207296 (6 May 1982), 82-1 CPD para. 435, on reconsideration Comp. Gen. Dec. B-207294 (10 May 1984), 82-1 CPD para. 451; Comp. Gen. Dec. B-186958 (10 Jan. 1977), 77-1 CPD para. 17.

<sup>45</sup>Comp. Gen. Dec. B-217038.2 (7 Feb. 1985), 85-1 CPD para. 159.

<sup>46</sup>43 Comp. Gen. 193 (1963); 49 Comp. Gen. 28 (1969) (where it is clear that the agency has misappropriated data, the remedy will be either to award the contract on a sole source basis or omit the data from the solicitation).

conduct violative of the Trade Secrets Act.<sup>47</sup> When a protestor suspects that a contracting agency may have released or will release proprietary data to a competitor, but this is denied by the agency, the protestor has not met the burden of establishing his claim. The protestor bears the burden of presenting clear and convincing evidence of rights in proprietary data.<sup>48</sup>

#### IV. HISTORICAL REGULATORY TREATMENT OF TECHNICAL DATA RIGHTS

The treatment of protectable trade secrets in technical data is a relatively new area of the law. The United States has fielded a standing peacetime army only since the end of World War II.<sup>49</sup> A defense industry has emerged since that time consisting of corporations selling primarily or exclusively to the Government.<sup>50</sup> In the late 1940's the concept of protecting technical data or trade secrets was unknown.<sup>51</sup> There were no definite rules or regulations even pertaining to patents during World War II.<sup>52</sup> Following the war, Congress passed the Armed Services Procurement Act, which established procedures for military procurement.<sup>53</sup> A regulation implementing the Act, the Armed Services Procurement Regulation (ASPR) was adopted effective 19 May 1948.<sup>54</sup> No mention appeared in the original ASPR regarding technical data. The regulations expressly covered only data protected by patents and copyrights.<sup>55</sup> As the fledgling defense industry grew to include the giant corporations which exist today, pressure was exerted to include greater protection for technical data. A review of the changes wrought in the regulations reveals

<sup>47</sup>Comp. Gen. Dec. B-206481 (28 July 1982), 82-2 CPD para. 89.

<sup>48</sup>Comp. Gen. Dec. B-199539 (26 Mar. 1981), 81-1 CPD para. 225; Comp. Gen. Dec. B-187051 (15 Apr. 1977), 77-1 CPD para. 262; Comp. Gen. Dec. B-177436 (12 Mar. 1974), 74-1 CPD para. 126; 52 Comp. Gen. 773 (1973).

<sup>49</sup>J. Goodwin, *A Brotherhood of Arms* (1985).

<sup>50</sup>The history of one of the most powerful and controversial defense contractors, General Dynamics, is chronicled in *A Brotherhood of Arms*, *supra* note 49.

<sup>51</sup>Subcommittee No. 2, *supra* note 1, at 34.

<sup>52</sup>*Id.*

<sup>53</sup>10 U.S.C. § 137 (1982 & Supp. III 1985).

<sup>54</sup>See Bell Helicopter Textron, ASBCA No. 21192, 85-3 BCA para. 18,415, for Judge Lane's scholarly discourse detecting the roots of technical data rights in the patent rights clauses of the Army Procurement Regulations of World War II and the early Armed Services Procurement Regulations, and examining the application of technical data rights by subsequent regulatory bodies.

<sup>55</sup>Hinrichs, *Proprietary Data and Trade Secrets Under Department of Defense Contracts*, 36 Mil. L. Rev. 61 (1967).

ever growing protections for industry in the Government treatment of technical data.

### A. THE 1955 REVISIONS

Specific treatment of technical data first appeared in the 1955 version of the ASPR, in the paragraph designated "Technical Data in Research and Development Contracts."<sup>56</sup> Complete rights to reproduce, use and disclose data for Government purposes were delivered to the Government in all contracts for experimental or research work. Even data that originated prior to contract award was included. The data could be used for competitive reprocurement or for any Government purpose. The paragraph included "reports, drawings, blueprints, data and technical information" within its purview.<sup>57</sup> The treatment accorded technical data mirrored the standard treatment given patents under the Patent Rights clause.<sup>58</sup> One paragraph that had formerly been part of the patent rights section of the regulation had merely been deleted from the Patent Rights clause and listed separately.<sup>59</sup> This paragraph did not make any provision for protecting the contractor's trade secrets once they were divulged to the Government. Unless the contract included the cost of the data in the overall contract price, no payment was payable to the contractor for his proprietary information.<sup>60</sup>

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<sup>56</sup>The text of the paragraph reads:

§ 9-112 Technical data in research and development contracts. The clause set forth below shall be included in all contracts for experimental, development or research work:

#### Reproduction and Use of Technical Data.

The contractor agrees to and does hereby grant to the Government to the full extent of the contractor's right to do so without payment of compensation to others, the right to reproduce, use and disclose for Governmental purposes (including the right to give to foreign Governments for their use as the national interest of the United States may demand) all or any part of the reports, drawings, blueprints, data, and technical information specified to be delivered by the contractor to the Government under this contract. *Provided however*, That nothing contained in this paragraph shall be deemed, directly or by implication, to grant any license under any patent now or hereafter issued or to grant any right to reproduce anything else called for in this contract.

ASPR § 9-112 (4 Jan. 1955).

<sup>57</sup>*Id.*

<sup>58</sup>Subcommittee No. 2, *supra* note 1, at 40.

<sup>59</sup>*See id.*; *Bell Helicopter Textron*; Hinrichs, *supra* note 55.

<sup>60</sup>Subcommittee No. 2, *supra* note 1, at 30.

Contractors did attempt to protect their rights by placing a restrictive notice on manufacturing drawings delivered to the Government. The notice generally prohibited disclosure of the information outside the Government, particularly to second sources in procurement solicitations.<sup>61</sup> The Government's position has always been that all rights are delivered to the Government under the common law, and that only those rights reserved in the specific contract language need be honored.<sup>62</sup>

### B. THE 1957 REVISIONS

The defense industry interposed serious objections to the loss of technical data, and the regulatory provision was completely rewritten in 1957.<sup>63</sup> The term "technical data" was replaced by a new system of classifying information. Information was defined as proprietary data, design data, or operational data.<sup>64</sup> Only proprietary data was protected, while design data and operational data continued to be subject to delivery to the Government.<sup>65</sup> This was an illusory protection at best. Design data included the engineering or design information which could be used as a blueprint to manufacture an item. Only trade secrets or manufacturing processes not revealed by the design itself were classified as proprietary data which could be withheld.<sup>66</sup> Other trade secrets received no protection from unlimited use by the Government. Engineering drawings were used to allow greater competition in formal advertising. The contractor had to produce complete engineering drawings in almost every contract entered into with the Government.<sup>67</sup> The Government would then incorporate the contractor's design work (with trade secrets revealed) into subsequent solicitations. The originator of the design enjoyed no competitive advantage when bidding to perform the work no matter how

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<sup>61</sup>*Id.*

<sup>62</sup>*Id.*

<sup>63</sup>The revised provision reads:

Subpart B—Data and Copyrights (Revised)

Source: § 9.200 *Scope of subpart*. This subpart sets forth the Department of Defense policy, implementing instructions, and contract clauses with respect to acquisition and use of writings, sound records, pictorial reproductions, drawings, or other graphic representations and works of any similar nature (whether or not copyrighted), called "data" in this subpart, furnished under contract.

ASPR § 9.200 (9 Apr. 1957).

<sup>64</sup>See ASPR §§ 9.201-9.203 (9 Apr. 1957) (reproduced as appendix A to this article).

<sup>65</sup>ASPR § 9.202-2(a) (9 Apr. 1957).

<sup>66</sup>ASPR § 9.202-1 (9 Apr. 1957).

<sup>67</sup>Subcommittee No. 2, *supra* note 1, at 33.

much money or private resources have been expended in developing the original product.

Data from experimental, research, and development contracts was obtained without limitation as to its use.<sup>68</sup> Similarly, supply contracts entered into for the purpose of developing second sources of supply involved delivery of data without limitation as to use.<sup>69</sup> An exception was carved out for standard commercial items, either when obtained in advertised supply contracts<sup>70</sup> or incorporated as a component part of the product deliverable under a research and development contract.<sup>71</sup>

Contracts awarded during this period usually incorporated the proprietary data clause, which gave nominal protection to proprietary data. But a drawing-specification clause requiring the preparation of detailed drawings eliminated any protections; the manufacturing drawings, which were unprotected, revealed most trade secrets.<sup>72</sup> The combination of these contract provisions usually left the Government with unlimited data rights. A limited rights clause existed which purported to restrict the use of drawings submitted in supply contracts to contracts for other than procurement from second sources.<sup>73</sup> However, it was used only in unusual cases.<sup>74</sup> Far more commonly, a contractor might intend to protect his data but find out too late that the Government owned unlimited rights.

A case in point was *Universal Target Company*,<sup>75</sup> in which the contractor developed at its own expense a paper honeycomb target covered with aluminum. The target was towed for fighter crew training.<sup>76</sup> The targets represented an improvement over previous Air Force targets, which had been of the same configurations but made of plywood. The company had never before contracted with the Government and signed three contracts to sell less than 500 targets. The contracts contained the standard technical data provisions. The Air Force then used the engineering drawings from Universal Target Company to issue an Invitation for Bids (IFB) for 2,494 tow targets. The company was

<sup>68</sup>ASPR § 9.202-2(b)(1) (9 Apr. 1957).

<sup>69</sup>ASPR § 9.202-2(b)(2) (9 Apr. 1957).

<sup>70</sup>ASPR § 9.202-1(b) (9 Apr. 1957).

<sup>71</sup>ASPR § 2.202-1(c) (9 Apr. 1957).

<sup>72</sup>Subcommittee No. 2, *supra* note 1.

<sup>73</sup>ASPR § 2-203-3 (9 Apr. 1957).

<sup>74</sup>Subcommittee No. 2, *supra* note 1.

<sup>75</sup>38 Comp. Gen. 667 (1959).

<sup>76</sup>*Id.* at 670.

the sixth lowest bidder,<sup>77</sup> thereby losing not only the contract, but its investment in producing the target.

The Government was not alone in benefiting from this policy. Prime contractors used similar contract language to extract trade secrets from their subcontractors.<sup>78</sup> The 1957 revision of the ASPR proved so unpopular that it lasted only one year. Members of Congress joined with industry in denouncing the notion that the Government was entitled to data without compensation, terming it "[O]ffensive to the American way of business and American principles of democracy."<sup>79</sup>

### C. THE 1958 REVISIONS

On 15 October 1958, a revision of the ASPR<sup>80</sup> allowed contractors to remove "proprietary data" from their designs in advertised contracts and/or contracts for standard commercial items. The Government received a second set of drawings with trade secrets expurgated.<sup>81</sup> Unless specified for in the schedule — even if the data was called for in the specifications — the new revisions permitted removing proprietary data from drawings accompanying supply contracts not having experimental work as the primary purpose.<sup>82</sup> Once again, contracts for standard commercial items did not require accompanying data.<sup>83</sup> This revision for the first time extended the protection to subcontractors.<sup>84</sup> Contractors still had to furnish complete drawings in supply contracts where a clear Government need was established, the contract schedule clause specified complete drawings, and specific negotiations for the data were performed and listed as a separate contract item.<sup>85</sup> Thus, contracting officers who could articulate a clear Government need could still obtain unlimited rights in most data.

A separate data rights clause was used in research and development contracts.<sup>86</sup> This clause provided that data need not be supplied for standard commercial item or items developed at private expense when these items were used as components for or

<sup>77</sup>*Id.* at 668.

<sup>78</sup>Subcommittee No. 2, *supra* note 1, at 32.

<sup>79</sup>*Id.*

<sup>80</sup>ASPR §§ 9.200-202.3 (15 Oct. 1958) (reproduced as appendix B to this article).

<sup>81</sup>Bell Helicopter Textron, ASBCA No. 21192, 85-3 BCA para. 18,415, at 92,388-92.

<sup>82</sup>*Id.* at 92,382.

<sup>83</sup>Hinrichs, *supra* note 55, at 72.

<sup>84</sup>*Id.*

<sup>85</sup>*Id.*

<sup>86</sup>ASPR § 9.202-1(c) (15 Oct. 1958).



in conjunction with products developed under the terms of research and development contracts.<sup>87</sup>

The new policy of withholding data reflected a desire "to encourage inventiveness and to provide incentive thereof by honoring the 'proprietary data' resulting from private developments and hence to limit demands for data to that which is essential for Government purposes."<sup>88</sup> Commentators have called the drawings with proprietary data removed "swiss-cheese drawings."<sup>89</sup> Swiss-cheese drawings created problems when contractors withheld proprietary information in their bids, rendering the bid nonresponsive.<sup>90</sup> Following contract award, contractors would at times deliver data so incomplete as to be unusable by the Government.<sup>91</sup> Contractors argued that overzealous contracting officers continued to usurp the developer's right to the fruits of his efforts by finding a Government need for the data.<sup>92</sup>

### D. THE 1964 REVISIONS

Constant complaints from industry centered upon the belief that the 1958 ASPR revision required contractors and subcontractors to make their proprietary data known, thus destroying the firm's competitive position and discouraging companies from contracting with the Government.<sup>93</sup> Major contractors argued that the Government did not need all of the information requested and, if the Government actually needed the information, it should pay for it.<sup>94</sup> In response to the growing contractor dissatisfaction concerning the loss of trade secrets, the Department of Defense in 1964 abandoned the concept of proprietary data and implemented new regulations which would remain in force, largely unchanged, for the next twenty years.<sup>95</sup> The 1964 revisions defined contractor rights in terms of "technical data,"<sup>96</sup> "limited rights,"<sup>97</sup> and

<sup>87</sup>ASPR § 9.202-1(c)(1)(2) (15 Oct. 1958).

<sup>88</sup>ASPR § 9.202-1(a) (15 Oct. 1958).

<sup>89</sup>See Nash and Rawicz, *supra* note 1, at 428; see also Hinrichs, *supra* note 55, at 72.

<sup>90</sup>41 Comp. Gen. 510 (1962).

<sup>91</sup>Nash and Rawicz, *supra* note 1, at 428.

<sup>92</sup>Subcommittee No. 2, *supra* note 1, at 38.

<sup>93</sup>*Senate and House Committees Finish Hearings on Data Rights and Military Sole Source Procedures*, The Government Contractor, Vol. 2, No. 8, para. 193 (1960).

<sup>94</sup>*Proprietary Reforms are Requested*, The Government Contractor, Vol. 2, No. 10, para. 245 (1960).

<sup>95</sup>See Nash and Rawicz, *supra* note 1, at 429; see also Continental Electronics Mfg. Co., ASBCA No. 18704, 76-1 BCA para. 11,654.

<sup>96</sup>"Data" included "writings, sound recordings, pictorial reproductions, drawings, or other graphic representations and works of similar nature, whether or not copyrighted. The term does not include financial reports, cost analyses, and other

"unlimited rights."<sup>98</sup> Data developed at the contractor's private expense would be furnished to the Government on a "limited rights basis."<sup>99</sup> The Government obtained limited rights to use this data for evaluation, maintenance and classification purposes only. Data developed at Government expense would be furnished to the Government on an unlimited rights basis, which would include the right of using the data for competitive reprourement.<sup>100</sup> This revision represented a huge gain for private

information incidental to contract administration." ASPR § 9.201(a) (14 May 1964).

<sup>98</sup>"Limited rights" means:

rights to use, duplicate, or disclose technical data in whole or in part by or for the Government, with the express limitation that such technical data may not be released outside the Government, or used, duplicated, or disclosed, in whole or in part, for manufacture or procurement, except for:

(1) Emergency repair or overhaul work by or for the Government where the item or process concerned is not otherwise reasonably available to enable timely performance of the work; and

(2) Release to a foreign Government, as the interests of the United States may require;

*Provided*, That in either case the release of such technical data shall be made subject to the foregoing limitations of this paragraph.

ASPR § 9.201(b) (14 May 1964).

<sup>99</sup>(c) "Unlimited rights" means "rights to use, duplicate, or disclose technical data in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so." ASPR § 9.201(c) (14 May 1964).

<sup>100</sup>The contractor's financial interest in data developed at private expense was set out in § 9.202-1(b):

(b) *Contractor's interest in technical data.* Commercial organizations have a valid economic interest in data they have developed at their own expense for competitive purposes. Such data, particularly technical data which discloses details of design or manufacture, is often closely held because its disclosure to competitors could jeopardize the competitive advantage it was developed to provide. Public disclosure of such technical data can cause serious economic hardship to the originating company.

ASPR § 9.202-1(b) (14 May 1964).

<sup>100</sup>ASPR § 9.202-2(b) (14 May 1964) set out when the Government would obtain unlimited rights:

(b) *Unlimited rights.* Technical data in the following categories, when specified in any contract as being required for delivery, or subject to order under the contract, shall be acquired with unlimited rights:

(1) Technical data resulting directly from performance of experimental, developmental, or research work which was specified as an element of performance in a Government contract or subcontract;

(2) Technical data necessary to enable others to manufacture end-items, components and modifications, or to enable them to perform processes, when the end-items, components, modifications, or processes have been, or are being, developed under Government contracts

industry. No longer did the Government have the right to purchase an item, demand complete engineering drawings, and use the drawings as a basis for an IFB or Request for Proposals (RFP) to find a supplier willing to provide the item at a lower price or to develop second sources of supply. Recognizing limited rights in technical data amounted to recognition of trade secret rights in data generated at private expense.

*1. Limited Rights Protection: New Limitations on the Government's Ability to Procure Data.*

The revisions represented an about-face in policy. The revisions focused upon ownership rights in technical data. The defense industry's need to show a return for private investment was satisfied by protecting data developed at private expense. The revisions reduced the Government's control over information.

The contractor's right to protect data was broadened. The right to assert limited rights protection was not determined by the type of contract involved. No longer could the Government claim the rights to all data developed under research and development contracts. Rather, the emphasis was placed upon tracing whose resources had paid for the development of the items, components, or processes being offered for sale. The Government's right to use technical data was settled by determining whether the item had been developed at private expense.<sup>101</sup> The Government had already paid for data developed at Government expense. Therefore, the developer could not limit the Government's rights in what was already Government property. Similarly, data developed at private expense belonged to the contractor, and the Govern-

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or subcontracts in which experimental, developmental or research work was specified as an element of contract performance, except technical data pertaining to items, components or processes developed at private expense;

(3) Technical data constituting corrections or changes to Government-furnished data;

(4) Technical data pertaining to end-items, components or processes which was prepared for the purpose of identifying sources, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements ("form, fit and function" data, e.g., specification control drawings, catalog sheets, envelope drawings, etc.);

(5) Manuals or instructional materials prepared for installation, operation, maintenance or training purposes; and

(6) Other technical data which has been, or is normally furnished without restriction by a contractor or subcontractor.

<sup>101</sup>*Id.*

ment respected those rights by not demanding unlimited rights in the data.<sup>102</sup> Procedures for the negotiation and acquisition of unlimited rights in privately developed items or processes were narrowly defined.<sup>103</sup> The Government was not to procure unlimited rights in such data unless absolutely necessary. Absolute necessity existed only if there was a clear need for the data, no suitable alternate item or process existed, the data purchased would permit manufacture by other manufacturers without the need for additional technical data, and purchase of the data would represent a net savings in procurement costs.<sup>104</sup>

The right to assert limited rights protection meant that a contractor could no longer withhold data. This signalled a significant change in technical data rights as it foreclosed the prior contractor practice of delivering "Swiss-cheese drawings." Now the contractor had to deliver a complete technical data package to the Government—but marked with a notice that only limited rights in the data were conveyed. This notice took a prescribed form, known as a limited rights or restrictive legend.<sup>105</sup>

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<sup>102</sup>ASPR § 9.202-2(d) (14 May 1964).

<sup>103</sup>*Id.*

<sup>104</sup>ASPR § 9.202.1 (14 May 1964).

<sup>105</sup>The procedures appeared at ASPR 9.202-3 (14 May 1964):

(a) *Establishing the Government's rights to use technical data acquired.* All technical data specified in a contract or subcontract for delivery thereunder shall be acquired subject to the rights established in the appropriate Rights in Technical Data clauses set forth in this subpart. Except as provided in § 1.1707 of this chapter and Subpart I, Part 18 of this chapter, no other clauses, directives, standards, specifications or other implementation shall be included, directly or by reference, to enlarge or diminish such rights. The Government's acceptance of technical data subject to limited rights does not impair any rights in such data to which the Government is otherwise entitled or impair the Government's rights to use similar or identical data acquired from other sources.

(b) *Marking and identification of technical data.* Technical data delivered to the Government pursuant to any contract requirement shall be marked with the number of the prime contract, and the name and address of the contractor or subcontractor who generated the data. When technical data is received subject to limited rights, such identifying markings and the authorized restrictive legend shall be maintained on all reproductions thereof.

(c) *Unmarked or improperly marked technical data.* (1) Technical data received without a restrictive legend shall be deemed to have been furnished with unlimited rights. However, the contracting officer may permit the contractor to place a restrictive legend on such data within six months of its delivery if the contractor demonstrates that the omission of the legend was inadvertent and the use of the legend is authorized.

If not marked with the correct legend, unlimited rights in the data were accorded to the Government. If data marked with a legend was "not permitted by the terms of the contract," the Government could nonetheless assert only limited rights pending inquiry to the contractor who claimed origination of the data.<sup>106</sup> If the contractor did not respond to the inquiry or failed to show the restriction was authorized, Government personnel were instructed to "obliterate such legend."<sup>107</sup>

An optional provision for the determination of rights by preaward agreement was designed to alert the contractor and the Government to areas of potential disagreement concerning the contractor's assertion of limited rights.<sup>108</sup> The provision carried little force as it was optional, not mandatory; and because it was undercut by another provision which allowed assertion of limited rights up to six months following the delivery of information to

(2) Technical data received with a restrictive legend not permitted by the terms of the contract shall be used with limited rights pending inquiry to the contractor whose name appears on the data as the originator. If no response to a properly directed inquiry has been received within 60 days, or if the response fails to show that the restriction was authorized the cognizant Government personnel shall obliterate such legend, notify the contractor accordingly, and thereafter may use such data as if it were acquired with unlimited rights.

(3) If the contract authorizes the contractor to furnish technical data with limited rights, but the restrictive legend employed by the contractor is not in the form prescribed by the contract, the data shall be used with limited rights, and the contractor shall be required to amend the legend to conform with that specified in the contract. If the contractor fails to so amend the legend within 60 days after notice, the cognizant Government personnel shall obliterate the legend, notify the contractor accordingly, and thereafter may use such data with unlimited rights.

(d) Technical data furnished on a restricted basis in support of a proposal. When, in response to a request for a proposal, an offeror submits technical data on a restricted basis in accordance with § 3.507 of this chapter and it is contemplated to award the contract to such offeror, the contracting officer will ascertain whether to acquire rights to use all or part of the technical data furnished with the proposal. If such rights are desired, the contracting officer will negotiate with the offeror in accordance with the policies set forth in §§ 9.202-9.202-3. If the offeror agrees to furnish such technical data under the contract, the appropriate clause set forth in § 9.203 shall be inserted in the contract, and the contract shall identify the data to be covered by such a clause.

ASPR § 9.202-3, as amended at 30 Fed. Reg. 14,092 (1965).

<sup>106</sup>ASPR § 9.202-3(c)(2) (14 May 1964). This was viewed as a great improvement over past practices where the Government had the right to remove legends without notice to the contractor. Hinrichs, *supra* note 55, at 80.

<sup>107</sup>ASPR § 9.203 (14 May 1964).

<sup>108</sup>*Id.*

the Government. In addition the regulations did not define "private expense" nor did they specify who should make such a determination. Contracting officers would have to guess not only what standard to apply, but which Government personnel had the power to challenge and remove restrictive legends.

## 2. The Term "Developed at Private Expense."

The drafters of the regulation failed to define the crucial term "developed at private expense."<sup>109</sup> This key term contains two components: "developed" and "private expense."

The starting point for determining whether an item is developed at private or Government expense is fixing the point in time at which an item is considered "developed." Prior to the 1964 ASPR revisions, an item was protected only if it had been sold or offered for sale prior to the existing Government contract.<sup>110</sup> The item must have come into existence and been offered for sale in the marketplace. This requirement was abandoned because most weapons systems cannot be offered to the marketplace and because some agencies, such as NASA, routinely contract to build items which have never existed before and which cannot be tested under real life conditions prior to their usage.

In 1964 and again in 1969, the ASPR subcommittee on technical data rights broached, then backed away from attempting to define the terms. Between 1973 and 1975, the ASPR Committee attempted, again unsuccessfully, to provide a regulatory definition for "developed at private expense."<sup>111</sup> The Committee focused upon defining the point at which an item could be considered brought to completion. The Air Force, in particular, wished to counter industry's practice of labelling as "developed" an untested concept or an assembly of experimental hardware without performing practical tests.<sup>112</sup> The ASPR Committee circulated the following proposed definition of "developed", seeking industry comments, in April 1974:

*Developed* as is used in the phrase "developed at private expense" means brought to the point of practical application, i.e., to be considered *developed* an item or component must have been constructed, a process practiced, and computer software used, and in each case it must

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<sup>109</sup>Bell Helicopter Textron, ASBCA No. 21192, 85-3 BCA para. 18,415.

<sup>110</sup>ASPR § 9-202.1(c)(2) (15 Oct. 1958).

<sup>111</sup>The attempt was initiated by the Air Force policy member of the ASPR Committee. *Bell Helicopter Textron*, 85-3 BCA at 92,389-93.

<sup>112</sup>*Id.* at 92,393.



have been tested so as to demonstrate that it performs the objective for which it was developed.<sup>113</sup>

This definition contained two aspects: the item must be in existence in the sense that it had reached the point of practical application, and it must be tested in the sense that it could be shown to have performed the task for which it was produced. Some members of private industry rejected both the existence and testing aspects, asserting "it should be sufficient simply to show development of data embodied in engineering notebooks, drawings, drawing releases and other documentation."<sup>114</sup> Most industry members agreed that the item should exist in some form to qualify for limited rights protection but argued that the testing requirements should be drafted in the form of a "workability" definition: the item or process has been sufficiently designed or developed that reasonable persons schooled in that art would conclude that it would work. Contractors and the Government remained far apart on the definition of "developed" and could not reach a consensus.

Defining private expense proved equally impossible to achieve. The 1974 ASPR Committee defined this term as requiring development to be totally, not partially, at private expense. An exception to this policy was proposed in relation to independent research and development expenses. Indirect allocation of development costs through overhead, costs, and bid and proposal expenses reimbursed by the Government in independent research and development were considered as development from the contractor's private funds. This definition did not reach the point of circulation for industry comment, but was withdrawn on 15 March 1974.<sup>115</sup>

Ultimately, a majority of the ASPR Committee recommended that no further definition be adopted. The Air Force members dissented, but the ASPR Committee closed its discussion without action on 4 April 1975. The Air Force Systems Command alone promulgated a local agency regulation adopting a definition of developed, drawn from patent law, along with an explanation containing the proposed existence and testing requirements.<sup>116</sup> The regulation stated that "[w]hen an item, component, process, or software does not meet these criteria, separable portions

<sup>113</sup>*Id.* at 92,394.

<sup>114</sup>*Id.* at 92,395.

<sup>115</sup>*Id.* at 92,394.

<sup>116</sup>*Id.* at 92,398.

thereof which do meet these criteria will be considered to have been developed."<sup>117</sup>

*3. Consequences of The Failure to Define "Developed At Private Expense."*

The 1964 revisions marked the last major revision in technical data rights regulations until 1985. Although the language of the regulation was rewritten and expanded, the policy considerations remained the same and the same principles governed rights in data. The failure to arrive at a regulatory definition fanned the conflict over ownership rights in data. Contractors and the Government continued to be polarized in their interpretation of the phrase "developed at private expense." The regulation's failure to provide any definition of this key element in the acquisition of technical data rights made this area ripe for litigation. Broad questions were open for resolution. One question concerned how to allocate rights in severable portions of data. That is, could the Government purchase a severable right to a portion of technical data by funding modifications to a privately developed item. Also, when a privately funded item was a component in a larger government-funded assembly, were the rights to the data owned totally or partially by the Government. Another unanswered policy question concerned the Government's responsibility, if any, to promote competition by obtaining technical data rights. This issue was the concern of potential contractors who felt the Government should contest limited rights assertions more frequently to avoid continued sole source procurement. Finally, there was the question of the proper forum in which to raise technical data rights challenges.

The largest number of technical data rights complaints were made in bid protests before the GAO. GAO failed to develop a satisfactory resolution to technical data rights controversies because the standard of proof employed by GAO prevented the formulation of criteria which could be applied to ascertain rights in technical data. Although "developed" and "private expense" were generally addressed, a workable standard never emerged in GAO decisions. The Armed Services Board of Contract Appeals heard far fewer cases involving technical data rights, but did in 1985 address the issue directly and provide a definition of "developed at private expense"<sup>118</sup> as well as a lengthy analysis of respective contractor and Government rights.

<sup>117</sup>*Id.*

<sup>118</sup>*Id.* at 92,418-23.

Contractors also sought relief in other fora when they asserted severable rights in data. Specifically, contractors gained access to federal district court to seek injunctions against the Government's releasing data for competitive reprourement and to seek money damages when the Government had already released the data. Litigation in federal district court primarily focused upon defining what constituted a trade secret so as to qualify for limited data rights protection. Finally, contractors who had not entered into a contract but had disclosed trade secret information in confidence to the Government sought damages in the Court of Claims and federal district court under an implied-in-fact theory of contract. The next section of the article will examine this plethora of litigation spawned by the regulation's failure to define its key terms.

## **V. TECHNICAL DATA RIGHTS LITIGATION BEFORE GAO, ASBCA AND FEDERAL COURTS.**

### **A. GAO ATTEMPTS A DEFINITION**

#### *1. "Developed" Not Defined in Specific Terms.*

Although the Air Force had defined its rights more carefully in its regulation than the other services, subsequent cases did not always reflect a greater emphasis in the Air Force upon items being "developed" in the sense of being reduced to practice before acquisition. In 1977, Applied Devices Corporation (ADC) protested to GAO the Air Force's sole source procurement of APN 59B radars, tube-type devices. The device had had reliability problems dating back to the 1950's.<sup>119</sup> In 1967, a contractor, Sperry, began at its own expense to study improvements to the radar. The modified radars were flight-tested and Sperry submitted an engineering change proposal (ECP) to the Air Force in 1970. The Air Force approved the ECP and then, in 1974, awarded to Sperry a sole-source procurement for the engineering development and fabrication of eight Weather Navigation Radar Systems. The protest to the award stated that it was immaterial that Sperry expended its own funds prior to 1974, since the 1974 contract terms called for further development effort by Sperry. ADC claimed that because the contract called for development of the radar, the Government had financed the development and had

<sup>119</sup>Comp. Gen. Dec. B-187902 (24 May 1977), 77-1 CPD para. 362.

obtained unlimited rights in the data, which should be used for competitive reprourement purposes.

The Air Force's position was that development was complete prior to the contract as the "design concept was fully developed in the 1970 ECP."<sup>120</sup> A prototype radar had been constructed and flight-tested. Although the GAO decision does not speak in terms of the radar being brought to the point of practical application or being tested to demonstrate that it performed the objective for which it was developed, those criteria were met in the prototype. The term "development" in the contract, the Air Force argued, extended only to the updating of parts. The 1970 ECP referred to parts which were obsolete in 1974. Therefore, the contract called for incorporation of improvements in the state of the art in the preceding four years. Although GAO supported the Air Force in its position that it lacked unlimited rights in the radar modifications, it upheld the sole source award only to the extent that current and urgent requirements could be met. GAO recommended that current and urgent requirements be severed from the total requirements and that reprourement data be purchased to allow competition in the future.

In *Pioneer Parachute Co.*,<sup>121</sup> the Air Force had the right to order delivery of technical data for up to two years after termination of a subcontract for a mid-air recovery parachute system (MARPs) under its Deferred Ordering of Technical Data clause. The MARPs consisted of a main parachute, an engagement parachute, and a load line packed within a deployment bag. Two years passed and the deferred rights expired, but the Air Force continued to purchase the MARPs on a sole source basis with the justification that it did not own the data rights to permit a competitive procurement. The Air Force then directed that modifications be incorporated into already delivered MARPs. The solicitation referred to the MARPs as Government-furnished property that was to be unpacked, inspected, repaired, modified, repacked, and returned to the Air Force. The justification for the sole source procurement for the modifications was again that the Government did not possess the data to allow competitive procurement since there was no adequate leadtime for data generation and only one manufacturer had all the tooling required for packing.

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<sup>120</sup>*Id.* at 9.

<sup>121</sup>Comp. Gen. Dec. B-190798 & B-191007 (13 Jun. 1978), 78-1 CPD para. 431.

GAO rejected a bid protest on the grounds that the Air Force's actions had a reasonable basis. Although Pioneer Parachute protested because the Air Force had perpetuated sole source procurements by failing to demand delivery of data during a two year period, this was not the issue under the "reasonable basis" test. The issue was not whether the Air Force had behaved unreasonably, but whether the Air Force's position that it did not possess the data to allow competitive reprocurement was unreasonable. Although the Government easily might have procured the data, it had not done so; therefore the protest was denied.<sup>122</sup>

Pioneer also protested that the Air Force had developed the modifications that were to be incorporated under the contract; thus, the modifications had been developed at Government expense and the Government possessed unlimited rights in the data:

Ongoing events and the poor performance of the then developed system relegated future development to the Air Force Systems Command Aeronautical Systems Division. Additional development was accomplished utilizing Air Force personnel to redevelop the system into a condition which would be a viable flyable unit. Data rights to the best of our knowledge would have at that point been totally relinquished since the development work to correct the system's poor flying characteristics and operation was accomplished utilizing Air Force personnel.<sup>123</sup>

Pioneer claimed that the Air Force had uncovered faults in the system and had instructed the modifications to correct the faults. Pioneer's statement concerning the poor performance of the system prior to Air Force participation and testing goes to the second prong of the development test: that is, an item must be capable of performing the objective for which it was developed. The Air Force contended that it had not assumed responsibility for the development or redevelopment and design requirements of the contractor. The Air Force stated that the system had always performed satisfactorily and that its design efforts subsequent to the contract were "only to enhance system stability and improve reliability."<sup>124</sup>

GAO found that the Air Force had only financed modifications and improvements to an already developed system and had not

<sup>122</sup>*Id.* at 6, (citing Comp. Gen. Dec. B-187902 (24 May 1977), 77-1 CPD para. 362).

<sup>123</sup>*Id.* at 4.

<sup>124</sup>*Id.* at 8.

thereby gained unlimited rights in the data.<sup>125</sup> However, in view of the Air Force's failure not to order data when it had the opportunity to do so, GAO directed that the matter be brought to the attention of the Secretary of the Air Force.

*Chromalloy Division—Oklahoma of Chromalloy American Corporation*,<sup>126</sup> presents the common scenario where the contractor and Government work together to deliver improvements or modifications to an existing system. Chromalloy (CDO) received a contract for the weld repair of jet engine turbine blades for TF-30 jets on 30 July 1974. Numerous discussions were held concerning blade shroud repairs where the shroud was pitted deeper than 0.010 inch. Repairing the deeper pitting had not been successfully accomplished in the past. A solution was reached. The Air Force claimed the solution had been a joint effort by three entities: the Air Force agency, CDO, and another agency contractor. CDO filed a protest after the Air Force disclosed data in an RFP revealing the improved repair process. CDO claimed that CDO alone had introduced a new repair process and offered as proof an unsolicited proposal dated 16 December 1974. Although GAO found it "more probable . . . although . . . certainly not clear"<sup>127</sup> that CDO had introduced the new repair process, CDO had still not met its burden of proof by clear and convincing evidence. Because the Air Force contended that it had shared in the formulation of the improved repair process, CDO faced a measure of proof almost impossible to provide.<sup>128</sup>

In *Lockheed Propulsion Company*,<sup>129</sup> the Government claimed that a formula had been so modified during the course of contract performance that it bore no resemblance to the precursor formula which a contractor had developed at private expense. The end formulas had been developed by the Government, GAO ruled, because the formulas were wholly new and independent, not routine extensions of the precursor formulas. Some ingredients

<sup>125</sup>Contrast this result with Comp. Gen. Dec. B-196218 (28 Apr. 1980), 80-1 CPD para. 302, where Government involvement was described as involving "significant time and expense in preparation, and containing materials or concepts that could not be independently obtained from publicly available literature or common knowledge."

<sup>126</sup>Comp. Gen. Dec. B-187051 (15 Apr. 1977), 77-1 CPD para. 262.

<sup>127</sup>*Id.* at 10. GAO furthermore found that the weld repairs constituted a common shop practice even though one which had not been practiced heretofore.

<sup>128</sup>See Comp. Gen. Dec. B-190571 (26 Apr. 1978), 78-1 CPD para. 321; 52 Comp. Gen. 773 (1973); 46 Comp. Gen. 885, 889 (1967): "In matters involving technical expertise and consideration, to prevail a protestor bears the very heavy burden of showing by clear and convincing evidence that the agency's technical opinion and judgment is not reasonably based."

<sup>129</sup>52 Comp. Gen. 312 (1972).



were different and those ingredients in common were present in different weight percentages. The efforts in developing the end formulas were "massive."<sup>130</sup> Finally, GAO held that they could not find that the Air Force position was arbitrary or capricious, so there were no grounds to reject the agency views.<sup>131</sup>

The problem with the GAO definition of development is that it provided no standards or milestones by which to gauge the necessary level of development. The definition was devoid of meaning because the Government could take apparently conflicting positions on its ownership of data and subsequently be upheld by GAO. The existence and testing aspects of development were never explored. Instead amorphous terms such as "wholly new" or produced as a result of a "massive" effort were used to justify the Government's assertion of rights in data, while the Government merely "enhanced" and "improved" items when it wished to eschew ownership of data. GAO failed to produce a workable criteria for defining this term.

## 2. *Private Expense: The GAO Mixture of Funds Test.*

Determining the point at which an item is developed does not dictate whether a contractor conveys limited or unlimited rights in data. The item must have been developed at private expense for a contractor to accord only limited rights to the Government. The development of major weapons systems is rarely financed solely at private expense. Smaller acquisitions and subassemblies or components of major systems may be developed at private expense. Often small businesses are formed when an inventor conceives of a technological breakthrough which he then markets to the Government. If Government funds are used to modify or refine the resulting invention, a mixture of private funds and Government expense has contributed to the discovery. Apportionment of the rights in data when a mixture of funds has contributed to the success of an invention has proven a continuing source of controversy.

When the 1964 ASPR revisions were first promulgated, the Department of Defense claimed that when a mixture of Government and private funds in any ratio were used for development, the Government received unlimited rights in the item:

Where there is a mix of private and Government funds, the developed item cannot be said to have been developed

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<sup>130</sup>*Id.* at 316.

<sup>131</sup>*Id.*

at private expense. The rights will not be allocated on an investment percentage basis. The Government will get 100 percent unlimited rights except for individual components which were developed completely at private expense. Thus, if a firm has partially developed an item, it must decide whether it wants to sell all the rights to the Government in return for Government funds for completion or whether it wants to complete the item at its own expense and protect its proprietary data. On the other hand, if the Government finances merely an improvement to a privately developed item, the Government would get unlimited rights in the improvement or modification but only limited rights in the basic item.<sup>132</sup>

This "mixture of funds" test was adopted by GAO in the case of *Megapulse, Inc.*<sup>133</sup> The "mixture of funds" holding was that any mixture of Government and private expense resulted in unlimited rights to use the data inuring in the Government. The contractor in *Megapulse* had developed the concept for a megatron-powered long range navigation transmitter and entered into a series of development contracts with the Coast Guard extending over a ten-year period. The initial contract was to construct and test a demonstration model transmitter and deliver the test results to the Coast Guard. The second contract was for further development in specific problem areas uncovered by the demonstration model. The third contract was for the delivery of an engineering model, solid-state transmitter complete with software and engineering drawings. A Rights in Technical Data-Specific Acquisition (1964 May) clause gave the Government the right to duplicate, use, or disclose any of the technical data delivered under the contract, including the engineering drawings and software.<sup>134</sup> The fourth contract called for delivery of a preproduction prototype solid-state Loran-C transmitter and a set of drawings which could be used for competitive procurement of additional units. The contract obligated the contractor to negotiate and issue royalty-free licenses to those contractors designated by the Government.<sup>135</sup> All but one of the contractors bidding on the competitive procurement objected to executing the license, calling it "unduly restrictive."<sup>136</sup>

<sup>132</sup>Hinrichs, *supra* note 55, at 76.

<sup>133</sup>Comp. Gen. Dec. B-194982 (15 Jan. 1980), 80-1 CPD para. 42.

<sup>134</sup>*Id.* at 5.

<sup>135</sup>*Id.* at 8.

<sup>136</sup>*Id.* at 9.

The Coast Guard decided to evaluate the limited rights claims and offered Megapulse the opportunity to mark specific portions of data with a restrictive legend. Megapulse placed a legend on every item of data on approximately ten percent of 4,000 drawings. The Coast Guard asked Megapulse to clarify the claim by circling, underlining or noting the precise portions of data on each page. Megapulse responded by placing a line on the drawings encircling all the data on all of the drawings.<sup>137</sup> The conflict centered upon whose burden it was to substantiate the claimed data rights. Megapulse was reluctant to perform the exhaustive review required, claiming it was the Coast Guard's burden to demonstrate which of the items were not entitled to limited rights protection.<sup>138</sup>

GAO found that the original technology belonged to Megapulse but that the Government had funded extensive modifications to the transmitter. The data produced during the course of Government-funded contracts was the Government's. Further, the data which was delivered under the contract and not marked with a restrictive legend belonged to the Government under the terms of the data rights clause. Data delivered with unlimited rights under the three prior contracts could not be retroactively restricted at a later date. Only the properly labeled data which was developed at private expense could be delivered with limited rights.<sup>139</sup> The failure of Megapulse to carefully analyze and separate its original technology proved fatal to the position that Megapulse was entitled to severable rights in data. The hundreds of drawings which Megapulse marked with restrictive legends indicated to GAO that the original data and modifications could not be divided into privately- and government-funded components:

The proper test to be applied here is when data is not severable and the Government funds a significant portion of development, the Government is entitled to unlimited rights in the whole data; and when the data is severable, the Government is entitled to only limited rights in discrete components developed solely at private expense.<sup>140</sup>

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<sup>137</sup>*Id.* at 10.

<sup>138</sup>*Id.* at 9.

<sup>139</sup>Comp. Gen. Dec. B-194982 (15 Jan. 1980), 80-1 CPD para. 42; Comp. Gen. Dec. B-196218 (29 Apr. 1980), 80-1 CPD para. 305; Comp. Gen. Dec. B-190223 (22 Mar. 1978), 78-1 CPD para. 225; Comp. Gen. Dec. B-190517 (26 Apr. 1978), 78-1 CPD para. 321.

<sup>140</sup>Comp. Gen. Dec. B-194982 (15 Jan. 1980), 80-1 CPD para. 42.

GAO's position on private expense is simple: the contribution of Government funds results in unlimited rights in data owned by the Government. GAO avoided the more difficult question of how to ascertain ownership rights in severable portions of data. GAO ruled that when severable rights are not asserted by the contractor the Government owns unlimited rights in all the data.

*3. An Explanation for GAO's Failure to Discover and Set Out the Meaning of Crucial Terms.*

The results obtained before GAO are best explained by the very heavy burden which a protester bears in matters involving technical expertise and consideration. The protester must show the agency's technical opinion and judgment is not reasonably based.<sup>141</sup> Given this standard of proof, GAO is reluctant to disturb the initial agency determination deciding whether the assertion of limited rights is justified. In cases where the agency asserts Government development of data, GAO generally finds the assertion reasonable; where the agency denies Government development of data, the action will also be upheld. The only method of prevailing for the contractor is to show that uncontradicted written documents contained in the agency's file support the contractor's position.<sup>142</sup> If the agency's explanation was not contradicted by the written documents and is not unreasonable, the contractor cannot prevail at GAO. The result of this standard of proof is that the agency action will almost certainly be upheld, but the definition of the term "developed at private expense" has not evolved with clarity or precision.

The above cases demonstrate the futility of seeking a method of analysis from GAO in this area. The results are skewed in favor of the Government and clear definitions have not emerged. Since the Government frequently funds modifications or improvements to weapons systems or supplies, the need to find a workable definition is ongoing. Defining an end item as "wholly new and different" from a precursor item and produced as a result of "massive" Government effort does not provide a standard. Major weapons systems are rarely developed solely at private expense. When the first supersonic aircraft was built, entirely at private expense, the contractor, Bell, did not test-fly the Bell X-1 because no civilian test pilot was willing to take the risk of attempting

<sup>141</sup>Comp. Gen. Dec. B-190571 (26 Apr. 1978), 78-1 CPD para. 321.

<sup>142</sup>Even if the records support the proposition that the process or discovery was developed at private expense, the contractor bears the additional burden of demonstrating that the Government's position that the process was a common shop practice was unreasonable.

supersonic flight. Therefore a military volunteer test pilot, Captain Charles Yeager, was the first man to break the sound barrier.<sup>143</sup> The question remained open whether the Bell X-1 was "developed at private expense" as it did not perform the objective for which it was produced until it came into the hands of the military. Although contractors rarely, if ever, can meet the rigorous evidentiary burden, generally GAO looks for novelty, confidentiality and significant investment in assessing technical data rights protection.

## **B. ASBCA DEVELOPS CONCRETE CRITERIA**

The Armed Services Board of Contract Appeals succeeded where GAO failed in formulating criteria in the technical data field. The boards of contract appeals hear the technical data issues at evidentiary hearings with the contractor burden of proof limited to a preponderance of the evidence. Since the Board operates with a preponderance of the evidence standard, there is a greater need for clarity and precision in defining critical terms. This has resulted in a sharper focus in enunciating criteria measuring ownership rights in technical data. Fixing the point at which an item was "developed" was analyzed definitely and specifically when the Armed Services Board of Contract Appeals issued its decision in *Bell Helicopter Textron*.<sup>144</sup>

### *1. Development Defined in Patent Law Terminology.*

The Armed Services Board of Contract Appeals in *Bell Helicopter Textron*<sup>145</sup> approached the term "developed" by first analyzing historical regulations in the areas of patent law and contract research and development practice. Judge Lane, writing for the board, determined the terms used in these regulations to define the testing aspect of development—the "practicability," "workability," and "functionability" tests—were essentially consistent concepts and applicable to technical data rights. The board defined the crucial terms of contract language with a specificity not found in prior decisions by GAO, producing for the first time a standard definition. The board listed the following criteria to measure the point at which an item has been developed:

1. The item or component must exist in tangible or corporeal form. Almost without exception, a prototype of the object must

<sup>143</sup>Bell Helicopter Textron, ASBCA No. 21192, 85-3 BCA para. 18,415, at 92,400 (citing Hearings on H.R. 1180 Before a Subcommittee on Armed Services, 82d Cong., 1st Sess. (1951)).

<sup>144</sup>ASBCA No. 21192, 85-3 BCA para. 18, 415.

<sup>145</sup>*Id.*

have been created in order to demonstrate workability;

2. The item or component must have been sufficiently tested to demonstrate to reasonable persons skilled in the applicable arts a high degree of probability that the item or component will work as intended;

3. The type of testing required depends upon the nature of the item and the state of the art. Actual conditions testing will not be required if laboratory tests adequately simulate service conditions. Analysis, as opposed to testing, may serve to demonstrate workability;

4. The item need not be 100% complete. Further development may take place after it has reached the point of being developed for data rights purposes.<sup>146</sup>

The Board further defined "development" in similar but not identical terms to patent law's definition of "actual reduction to practice:"

Our construction of the term "developed" is quite close to the classic patent law concept of "actual reduction to practice" and indeed in many fact situations the two concepts might be identical . . . we do not hold, however, that "developed" and "actually reduced to practice" are necessarily identical concepts in every case.<sup>147</sup>

An analysis of cases applying the term "reduction to practice" within the realm of patent law reveals reduction to practice occurs when testing establishes that an invention will perform its intended function beyond a probability of failure.<sup>148</sup> In order to be considered reduced to practice, a new device must be sufficiently "complete and capable of working."<sup>149</sup>

In patent law application, testing may be performed by computer simulation. Testing, if performed by computer simulation, may prove insufficient to demonstrate the proper workability of a device. The failure to adequately simulate real world conditions usually is discovered after the Government subjects the device to use under actual conditions. If tests fail to simulate the varying and multiple conditions comprising the device's

<sup>146</sup>*Id.* at 92,422. The contractor had offered "the vague test that an innovative concept must have been transported into reality." *Id.* at 92,418.

<sup>147</sup>*Id.* at 92,422.

<sup>148</sup>*General Electric Co. v. United States*, 654 F.2d 55 (Ct. Cl. 1981); *Eastern Rotorcraft Corp. v. United States*, 384 F.2d 429 (Ct. Cl. 1967).

<sup>149</sup>*Coffin v. Ogden*, 85 U.S. (18 Wall.) 120,125 (1873).



intended environment, then the operability, stability, and reliability of the device has not been proven for practical usage. The device has not been reduced to practice.<sup>150</sup> Under patent law application, the device may be purchased and accepted by the Government and later be found not to have been reduced to practice.

If "developed" is taken to be nearly identical with "reduction to practice," then testing must demonstrate that an item is complete and capable of working. Items may be represented as being fully developed after testing under simulated conditions. Failure of simulated testing to adequately forecast actual conditions may result in failures when the item is subjected to actual conditions. Design changes and modifications made under Government control will then arguably give the United States unlimited rights in the technical data as the item was not developed before it reached government control.

## 2. Private Expense.

The Government and the contractor did not proffer different definitions of "private expense" in *Bell Helicopter Textron*.<sup>151</sup> However, the Government contested the contractor's claim that a prototype device had been manufactured solely with private funds. The item in question was a TOW (tube-launched, optically-guided, wire-tracked) launcher developed for the Cobra helicopter. An attempt to modify the TOW launcher to the Cobra helicopter was first attempted in the mid-60's. A contract was awarded to Hughes Aircraft for flight testing of an experimental launcher. A subsequent contract for the design, fabrication, and testing of a tactical launcher designed for field use was executed. Two years later, when funding in the program ran out, several conceptual difficulties in TOW launch from a helicopter remained. Hughes continued working to find conceptual solutions using private resources. Three design approaches were considered. The approach selected was a family of launchers adaptable with a missile installation kit to a variety of fixed wing and rotary wing aircraft. A prototype was constructed, but it was not test-fired, flight-tested, or tested for compatibility with the Cobra helicopter.<sup>152</sup> Engineering drawings, prepared at Hughes' expense, were sufficiently detailed to allow manufacture by a third party.<sup>153</sup> Hughes estimated the total cost of the independent research and develop-

<sup>150</sup>McDonnell Douglas Corp. v. United States, 670 F.2d 156, 162 (Ct. Cl. 1982).

<sup>151</sup>ASBCA No. 21192, 85-3 BCA para. 18,415.

<sup>152</sup>*Id.* at 92,363.

<sup>153</sup>*Id.*

ment at \$206,100, although the Government disputed this figure. The project manager of the independent research and development effort estimated that only three to five percent of the total development effort could be attributed to the initial Government-funded development contract. The board termed the three to five percent contribution "not a negligible amount" and held that private expense must be "totally at private expense."<sup>154</sup> The independent research and development had also benefited from the earlier Government-funded contract. Unsuccessful approaches had been revealed which were not attempted again. Significantly, the flight testing data had been generated under the first Government contract, as no flight testing had been performed under the independent research and development contract. The lack of actual conditions testing proved a primary consideration in deciding that development had not taken place at private expense.

ASBCA efforts at defining private expense mirrored the definition produced by GAO. Private expense means totally at private expense.

### ***C. FEDERAL DISTRICT COURT CLAIMS JURISDICTION TO PREVENT A VIOLATION OF THE TRADE SECRETS ACT***

The purpose of the Contract Disputes Act<sup>155</sup> was to divest district courts of all jurisdiction over Government contract disputes and concentrate that authority in the ASBCA or the United States Claims Court, the successor to the Court of Claims, at the contractor's option, and eventually in the Court of Appeals for the Federal Circuit.<sup>156</sup> The contractor in *Megapulse v. Lewis*<sup>157</sup> avoided this result by asserting a noncontract claim in federal district court alleging a trade secret violation.

After its protest was denied by GAO<sup>158</sup> on grounds that Megapulse had failed to meet its burden of showing no reasonable basis for the agency's denial of limited rights treatment, Megapulse sought an injunction against release of the data in federal district court. In connection with its motion for preliminary injunction, Megapulse narrowed its claim of limited rights

<sup>154</sup>*Id.* at 92,424.

<sup>155</sup>Contract Disputes Act of 1978, §§ 2-15, 41 U.S.C. §§ 601-613 (1982).

<sup>156</sup>*Id.*

<sup>157</sup>*Megapulse, Inc. v. Goldschmidt*, No. 80-1543, slip op. at 5 (D.D.C., Jan. 8, 1981).

<sup>158</sup>Comp. Gen. Dec. B-194982 (15 Jan. 1980), 80-1 CPD para. 42. See *supra* text accompanying notes 133-140.

treatment from approximately 400 to six documents delivered to the Coast Guard. The Government sought summary judgment on the grounds that the United States Court of Claims, now the Claims Court, possessed exclusive jurisdiction of Government contract disputes. As the Court of Claims could not grant declaratory or injunctive relief, the Government claimed an injunction could not be imposed to block the release of proprietary data. The district court granted the motion for summary judgment.<sup>159</sup>

The United States Court of Appeals for the District of Columbia<sup>160</sup> found as a matter of first impression that a private cause of action existed under the Administrative Procedures Act<sup>161</sup> to prevent an alleged violation of the Trade Secrets Act.<sup>162</sup> The court of appeals remanded the case to the district court to determine the merits of the alleged Trade Secrets Act violation. Thus, Megapulse was permitted to seek an injunction to safeguard its commercial interests which preexisted its contractual relationship with the Coast Guard. The court recognized a noncontract cause of action to protect technical data which could be classified as a "trade secret" by issuing an injunction.<sup>163</sup> This result must have been due in large part to Megapulse's narrowing of its claim to the six specific drawings in the data package which it claimed would minimally protect its commercial interests. Megapulse stated that the megatron technology was a trade secret making up its "commercial life blood."<sup>164</sup> Megapulse's limitation of its claim was made apparently in recognition of the facts that: Megapulse owned data rights only in the navigation transmitter device as it existed prior to the first contract with the Government;<sup>165</sup> the Government-funded modifications accorded unlimited data rights to the Government;<sup>166</sup> and the burden was on the party asserting severability of the data to show where the data could be severed.<sup>167</sup> Since the case was remanded, the court did not enunciate the standard of proof the contractor must meet

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<sup>159</sup>*Id.*

<sup>160</sup>*Megapulse, Inc. v. Lewis*, 672 F.2d 959 (D.C. Cir. 1982).

<sup>161</sup>5 U.S.C. § 702 (1982).

<sup>162</sup>18 U.S.C. § 1905 (1982). The Trade Secrets Act bars disclosure of trade secrets by Government employees only.

<sup>163</sup>672 F.2d at 971.

<sup>164</sup>*Id.* at 963 n.9.

<sup>165</sup>*Id.* at 966 n.32.

<sup>166</sup>Megapulse did not concede this point; it claimed ownership rights in data generated during contract performance but did not pursue this claim under the Trade Secrets Act. *Id.*

<sup>167</sup>Megapulse limited its claim to the six specific drawings which would "minimally protect its commercial interests." *Id.* at 963.

to prove its rights in technical data in federal district court. Megapulse was able to prevail even on this limited basis in large part because it was uncontested that the device was originally developed solely with private funding.<sup>168</sup>

The case was settled and did not return to federal district court. The Coast Guard agreed not to use the six contested drawings for competitive repurchase purposes. The point became moot when Megapulse was awarded the contract.<sup>169</sup> Thus, no federal court treatment of how trade secret law relates to technical data rights has emerged to date.

## VI. CONTRACTORS MUST INDICATE THEIR INTENT TO PROTECT DATA

### A. *The Limited Rights Legend*

To be accorded trade secret status, information must be submitted to the Government in confidence. The contractor must mark his data correctly and assert his rights in the correct form to receive protection for his trade secrets. To prevail in asserting limited rights protection for technical data, a contractor must demonstrate not only the substantive elements of novelty, confidentiality, and significant investment, but also that procedural requirements were observed. Legends which claim the data as proprietary or confidential must be placed on the data. Failing placement of a legend, the data must have been submitted in confidence. Omitting proprietary information required by an IFB or RFP may render the bid nonresponsive.<sup>170</sup>

In *Porta Power Pak*<sup>171</sup> GAO summarized its definition of technical data as follows:

First, the protester's design must have been marked proprietary or confidential, or the claimant must show that the proposal was disclosed to the Government in confidence. Second, it must be shown that the proposal involved significant time and expense in preparation and

<sup>168</sup>*Id.* at 961 n.1.

<sup>169</sup>Telephone conversation with David Brochstein, Office of General Counsel, who was Coast Guard Government counsel in the case of Megapulse v. Lewis (Feb. 20, 1986).

<sup>170</sup>Dobkin and Demsey, *Protection of Corporate Secrets in Government Contract Proposals and Bids*, 15 Pub. Cont. L.J. 46 (Aug. 1984). See also Nash and Rawicz, *supra* note 1, at 517.

<sup>171</sup>Comp. Gen. Dec. B-196218 (29 Apr. 1980), 80-1 CPD para. 305.

that it could not be independently obtained from publicly available literature or common knowledge.<sup>172</sup>

A contractor must affirmatively claim an interest in data by marking it with a restrictive legend or otherwise indicating that the information is submitted in confidence. Failure to so mark the data will result in delivery of unlimited rights to the Government.<sup>173</sup> As originally formulated in 1964 the legend took the following form:

Furnished under U.S. Government Contract No. \_\_\_\_\_ shall not be either released outside the Government, or used, duplicated, or disclosed in whole or in part for manufacture or procurement, without the written permission of \_\_\_\_\_, except for: (i) emergency repair or overhaul work by or for the Government, where the item or process concerned is not otherwise reasonably available to enable timely performance of the work, or (ii) release to a foreign Government as the interests of the United States may require; *Provided*, That in either case the release, use, duplication or disclosure hereof shall be subject to the foregoing limitations. This legend shall be marked on any reproduction hereof in whole or in part.<sup>174</sup>

Subcontractors were tasked with providing additional information giving the name of the prime contractor and the name of the subcontractor generating the technical data. A more restrictive policy of separating data on the drawing itself was instituted in 1974.<sup>175</sup> Contractors were required to circle or underscore data on the portions of the page to which the restrictive legend was attached. This policy was instituted because procuring agencies complained that contractors attached legends to all drawings and data. To focus upon that data which was truly proprietary, the procedure of underlining or circling data was instituted.<sup>176</sup>

*1. Failure to Assert Delivers Unlimited Rights to the Government.*

When the Government receives data without a restrictive legend submitted under a contract, the protester bears the burden

<sup>172</sup>*Id.* at 3.

<sup>173</sup>Comp. Gen. Dec. B-211789 (23 Aug. 1983), 83-2 CPD para. 242; Comp. Gen. Dec. B-201287 (1 Apr. 1981), 81-1 CPD para. 249; Comp. Gen. Dec. B-196218 (29 Apr. 1980), 80-1 CPD para. 305.

<sup>174</sup>ASPR § 2.203 (14 May 1964).

<sup>175</sup>ASPR § 9.202.3(c)(1) (1 Mar. 1974).

<sup>176</sup>Nash and Rawicz, *supra* note 1, at 435.

of showing by clear and convincing evidence that his proprietary rights have been violated. In *Wayne H. Coloney Company*<sup>177</sup> a subcontractor alleged that the prime contractor had wrongfully submitted the subcontractor's drawings to the Government without a restrictive legend attached. Since there was no legend attached, the subcontractor could not prove that it had ever marked the drawings proprietary or submitted them in confidence. GAO would not decide the related third party dispute concerning whether the prime contractor had acted improperly or illegally in obtaining the drawings from the subcontractor.<sup>178</sup> The fact that in other contracts the drawings had always been submitted with proprietary legends was considered irrelevant.

When the contractor has failed to mark drawings with a legend as a result of a conscious, although misguided decision, unlimited rights are delivered to the Government. In *Bell Helicopter Textron*<sup>179</sup> the contractor marked certain overall design drawings with restrictive legends, believing that the entire assembly had been developed at private expense and was therefore wholly protected. He did not place limited rights restrictions on the lower level subassembly drawings. When the ASBCA determined the overall design was not entitled to limited rights protection, the Board also found that twenty-one drawings which had been left unmarked not inadvertently, but as a result of a conscious decision, were unprotected.

The Board concluded as to these drawings:

Hughes lost any limited rights protection it might otherwise have had for these drawings, because it failed to mark them with any restrictive legend at the time of delivery; it did not seek permission to mark them within six months thereafter, and its failure to mark the drawings was not inadvertent but a considered judgment by responsible officials of the company. This is not a case of overreaching by the Government by taking advantage of an obvious mistake by a contractor.<sup>180</sup>

The forfeiture of limited rights protection represents the loss of a valuable property right. Therefore when the contractor places unauthorized legends on data, the burden is on the Government to inquire as to the merits of the limited rights assertion. If the

<sup>177</sup>Comp. Gen. Dec. B-211789 (23 Aug. 1983), 83-2 CPD para. 242.

<sup>178</sup>*Id.* (citing Comp. Gen. Dec. B-207294 (10 May 1982), 82-1 CPD para. 451).

<sup>179</sup>ASBCA No. 21192, 85-3 BCA para. 18,415.

<sup>180</sup>*Id.* at 92,435.



Government fails to inquire, the restrictive rights legend, although not in the format authorized, will be respected. The Government's regulations will be strictly enforced against the Government when the forfeiture of a claim of property rights hangs in the balance.<sup>181</sup>

The contractor must judiciously consider the placing of restricted rights legends. He must not claim too little data by marking only the top level assembly drawings as in *Bell Helicopter Textron*. However, if the contractor seeks to protect his interests by placing legends on all data, the overassertion of rights in protected data may also result in the loss of limited data rights.

## 2. Overassertion of Limited Rights May Result in Loss of Protection.

*Megapulse*<sup>182</sup> was lost at GAO because the contractor placed restricted legends on hundreds of drawings. The contracting officer challenged the assertion of rights on two separate occasions, offering the contractor the option of focusing upon protected data on each marked page. The contractor responded by circling all of the data on every page. Faced with this blanket claim to all of the data, GAO ruled that none of it could be given limited rights protection as the protected and unprotected portions were inextricably intertwined. On appeal, *Megapulse* managed to reduce its claim to six drawings.<sup>183</sup> When presented with a manageable number of claims, the Government settled the litigation and agreed to the limited rights assertion.<sup>184</sup>

In *Bell Helicopter Textron*<sup>185</sup> the Board found that eight drawings with improper legends may have contained severable portions containing data developed at private expense. This case also was remanded. The parties were instructed to negotiate the severable portions which might be given limited rights protection.<sup>186</sup>

The protection afforded by the legend limits the Government to in-house usage. The Government may not disclose the data for procurement purposes or use it for manufacture.<sup>187</sup> The Govern-

<sup>181</sup>*Id.*

<sup>182</sup>Comp. Gen. Dec. B-194986 (15 Jan. 1980), 80-1 CPD para. 42.

<sup>183</sup>872 F.2d 959 (1982).

<sup>184</sup>Telephone conversation with David Brockstein, *supra* note 169.

<sup>185</sup>ASBCA No. 21192, 85-3 BCA para. 18,415.

<sup>186</sup>*Id.* at 92,435.

<sup>187</sup>Nash and Rawicz, *supra* note 1, at 436-38.

ment may use the data for evaluation purposes, even to the extent of comparing it with data submitted by a competitor claiming independent invention or reverse engineering.<sup>188</sup> The restrictive legend contains an exception for disclosure outside the Government to other contractors for emergency repair purposes or release to a foreign government for information, evaluation, or emergency repairs. Limited rights data given to foreign governments must be delivered in confidence.<sup>189</sup>

### ***B. PROPOSALS SUBMITTED IN CONFIDENCE WITHOUT LEGENDS ATTACHED***

Proposals without legends attached may sometimes be deemed to have been submitted in confidence. Contractors may submit an unsolicited proposal incorporating an innovative approach to a technical problem in the hope of eliciting Government interest. Disputes arise when the Government incorporates the innovative approach into a solicitation for competitive procurement without compensating the originator. One such early case was *The Padbloc Company*.<sup>190</sup> Padbloc developed an improved technique for packaging napalm bombs. Padbloc's technical data package for the bomb containers was partly patented and partly trade secret. In a letter of negotiation sent to the Government, Padbloc offered to turn over all its data if the Government would agree to amend its specifications to require the Padbloc bomb containers and purchase the first 104,000 packages from Padbloc. After the first 104,000 packages, Padbloc agreed to give the Government a royalty-free license to use the data for any purpose. In response to the letter, the Government requested the data. The Government released the information directly to the napalm manufacturers, who then did not need to purchase containers from Padbloc. Padbloc claimed that it presumed the Government would protect its secret data while the Government disclaimed any obligation to do so. The court found that the Government had entered into an implied-in-fact contract not to breach Padbloc's confidential submission of information.<sup>191</sup>

The scope of the duty not to disclose technical data in unsolicited proposals was also treated in *Airborne Data, Inc. v. United States*.<sup>192</sup> The Government agency involved had a policy

<sup>188</sup>*Id.*

<sup>189</sup>*Id.*

<sup>190</sup>161 Cl. Ct. 369 (1963).

<sup>191</sup>161 Cl. Ct. at 378-79.

<sup>192</sup>702 F.2d 1350 (Fed. Cir. 1983).

which invited unsolicited proposals. Airborne Data submitted an unsolicited proposal concerning a method of taking aerial photographs for production of photographic maps of selected terrain quadrilaterals. A legend was attached to the data in accordance with agency regulation which provided that the data should not be used for any purposes other than evaluation. Contract negotiations were entered into but ultimately failed. The Government then issued an IFB to twenty-four bidders incorporating the methodology of taking the aerial photographs. While rejecting Airborne Data's contention that any sort of express contract had been entered into, the court held that Airborne Data was entitled to monetary damages for breach of an implied-in-fact contract:

The essence of this case is that defendant extended to plaintiff a valid and authorized invitation to submit an unsolicited proposal containing ideas originated, conceived, or developed by the plaintiff. Defendant prescribed how on submitting such a proposal, plaintiff might indicate that it did not want its ideas disclosed to the public. And, it stated, that all Government personnel "shall comply with the terms of the legend . . ." restricting such disclosure (and unauthorized use). Plaintiff accepted defendant's invitation. Consideration for the Governmental obligations resulting from the acceptance existed, and, upon a breach of those obligations (as here), a right to monetary damages from defendant resulting from that breach is enforceable in this court.<sup>193</sup>

Although confidentiality is the essence of trade secret protection, in the Government contracting context the confidentiality must be asserted on two levels. First, the contractor must maintain its secret from third parties. Second, when submitting information to the Government, the contractor must affirmatively indicate its intention to maintain confidentiality.

## VII. SEVERABLE RIGHTS IN DATA: THE GOVERNMENT'S USE OF TECHNICAL DATA FOR REPROCUREMENT PURPOSES

Sometimes the existence of limited rights in data is not apparent to contractors competing in follow-on contracts. This may cause a substantial problem when contractors submit bids without realizing that access to data is limited. Recent litigation

<sup>193</sup>*Id.* at 1361.

has centered upon severable data rights, when the Government owns unlimited rights in only a portion of the data.

If the Government possesses a technical data package sufficiently complete to allow a number of contractors to compete, a substantial savings may be realized. But when the Government owns only a part of the data, because of government-funded modifications or because component parts were developed at private expense, the Government may not possess a sufficiently detailed technical data package to promote competition. When this occurs, the Government may either attempt to assemble a complete data package or solicit the contract utilizing an incomplete data package.

### **A. ASSEMBLING A COMPLETE DATA PACKAGE**

When technological requirements are exacting, it may prove difficult to communicate requirements effectively short of providing a detailed technical data package, including drawings. The Government may purchase full rights to utilize all data from the existing contractor. This may be attractive to a contractor whose profit will be greater from selling the data than from continuing performance under the contract. If reprocurement is anticipated at the time of the initial contract, the Government could require a separate pricing option for the purchase of unlimited rights in the data. The failure to submit a price for the delivery of the technical data would render an offer nonresponsive.<sup>194</sup>

### **B. SOLICITING AN INCOMPLETE DATA PACKAGE**

The Government may issue a solicitation containing a technical data package with the protected information omitted. However, the Government must proceed with caution when issuing a solicitation containing less than complete design information. While the Government is not obliged to warn a potential bidder that certain data is proprietary,<sup>195</sup> the Government must not purport to furnish "Build-to-Print" or "Build-to-Specification" drawings if certain data is omitted from the package. This was

<sup>194</sup>Comp. Gen. Dec. B-211557 (9 Aug. 1983), 83-2 CPD para. 192. See also Dobkin and Dempsey, *Protection of Corporate Secrets in Government Contract Proposals and Bids*, 15 Pub. Cont. L.J. 46 (Aug. 1984); Nash and Rawicz, *supra* note 1, at 517.

<sup>195</sup>Arnold M. Diamond, Inc., ASBCA No. 22733, 78-2 BCA para. 13,447.

the claim of the contractor in the case of *Harris Corporation*.<sup>196</sup> The contract for the fabrication and supply of mobile satellite communications terminals included a technical data package which purported to contain all of the information necessary to either manufacture or procure component parts, and certified that: "Offerors are entitled to rely upon the "Build-to-Print" drawings; and, equipment built upon these drawings will meet the performance requirements of the applicable . . . specifications."<sup>197</sup>

The technical data package lacked "Build-to-Print" drawings for an integrated circuit unit. The contractor was unable to find a price for the unit in the Integrated Circuit Master Book, which is a catalog of commercially available items. The contractor estimated a \$5 unit price. In fact the item was not commercially available, as the holder of the data would not sell it as a spare part but only as part of a larger subassembly. The hired contractor through reverse engineering redesigned the integrated circuit unit. Harris Corporation then submitted a change order for the costs of design and development of the replacement circuit as well as for the difference between the price it bid and the price it paid for the item. The Board based its decision upon the Government's express warranty to provide build-to-print drawings:

The evidence is clear that the drawing in question, which was provided to appellant by the Government subsequent to award was defective. The drawing did not describe a part that was readily procurable on an unrestricted basis and did not contain adequate design data in the form of functional description, logic diagram, truth table and schematic design. The delivery of the defective drawing was a breach of an express warranty.<sup>198</sup>

The appeal for recovery in the amount of \$655,541 was sustained.<sup>199</sup>

In *Harris Corporation* the Government relied on the general principle of law that the Government does not have a duty to warn potential bidders on contracts involving proprietary data of that data's status. Although the specific facts of *Harris* proved an exception to this rule, the principle is still valid. By calling for

<sup>196</sup>ASBCA No. 26548, 85-3 BCA para. 18,167.

<sup>197</sup>*Id.* at 91,231.

<sup>198</sup>*Id.* at 91,241 (citing *Ordnance Research v. United States*, 609 F.2d 462, 479 (Ct. Cl. 1979); *Seven Sciences, Inc.*, ASBCA No. 21079, 77-2 BCA para. 12,730; *Omega Construction Co., Inc.*, ASBCA No. 22705, 78-2 BCA para. 13,425).

<sup>199</sup>*Id.* at 91,242.

certain components or even using brand names recommended for inclusion in performance of a Government contract, the Government is not warranting commercial availability.<sup>200</sup> The contractor is held to the duty of *inquiring* prior to award in order to foresee the costs of essential processes. When the Government does not have superior knowledge concerning an item's availability the contractor must obtain his information from sources other than the Government. The Government is under no duty to disclose the knowledge it possesses when the knowledge is available through normal commercial channels. In *Arnold Diamond Inc.*,<sup>201</sup> the contractor discovered after award that an essential subpart he required was patented. The Government instructed the contractor to either purchase the part or the manufacturing rights. The contractor was denied his additional costs.

When the part which is protected by trade secret is recommended rather than required and the identity of the manufacturer of the part disclosed, the burden shifts to the contractor to ascertain the part's commercial availability and cost.<sup>202</sup> The better practice for the Government would be to identify, to the extent possible, the proprietary data, to disclose the identity of the holder of the data and include a directive in the solicitation to either purchase the item or fabrication rights. As an alternative to purchasing data or withholding data in a solicitation, the Government could specify that the holder of the proprietary data execute a royalty-free license with the successful offeror or a successor contractor. This would place the successor in the position of a licensee with the duty not to disclose the data further.<sup>203</sup> Any of these solutions would prevent claims of Government overreaching and allow the contractor to arrive at a fair price when formulating a bid, rather than submitting a change order for additional costs later.

## VIII. CONGRESS SEEKS TO CREATE COMPETITION IN TECHNICAL DATA RIGHTS

In 1984, Congress reacted to the storm of controversy which surrounded apparently inflated and excessive prices charged for

<sup>200</sup> *Arnold Diamond, Inc.*, ASBCA No. 22733, 78-2 BCA para. 13,447.

<sup>201</sup> *Id.*

<sup>202</sup> *Mallory Engineering*, ASBCA No. 25509, 82-1 BCA para. 15,613.

<sup>203</sup> Only the owner of the data, not the licensee, has a protectable right in the technical data for GAO bid protest purposes. Comp. Gen. Dec. B-211868.2 (28 Dec. 1983), 84-1 CPD para. 32.



spare parts procurements<sup>204</sup> by passing three new laws aimed at creating a more competitive environment within the Government procurement agencies. The three new statutes are the Competition in Contracting Act of 1984,<sup>205</sup> the Defense Procurement Reform Act of 1984,<sup>206</sup> and the Small Business and Federal Procurement Competition Enhancement Act of 1984.<sup>207</sup> Of these three major reforms, two of the statutes contain major revisions concerning the treatment of technical data.

The provisions of the Defense Procurement Reform Act of 1984 [hereinafter Reform Act] and the Small Business and Federal Procurement Competition Enhancement Act of 1984 [hereinafter Competition Enhancement Act] concerning technical data are both incorporated into Title 10, United States Code.<sup>208</sup> The Reform Act solely affects military agencies while the Competition Enhancement Act concerns both civilian and military agencies.

The objective of the Reform Act is to increase competition within the Department of Defense acquisition agencies. A study of the cases where inordinately high prices charged to the Government has caused a public scandal revealed a lack of effective competition.<sup>209</sup> Congress was also concerned that lack of technical data or the right to use the data might be a major cause of the Government's failure to secure adequate competition. This supposition was not borne out by statistics kept by the Defense Logistics Services Center.<sup>210</sup> In the majority of cases, acquisitions

<sup>204</sup>H.R. Rep. No. 690, *supra* note 6, at 10.

<sup>205</sup>Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175 (codified as amended at Title 10, §§ 2301-2306, 2310, 2311, 2313, 2356; Title 31, §§ 3551-3556; Title 40, § 759; Title 41, §§ 251 note, 252-254, 257-260, 403, 405, 407 note, 414, 416-419 (Supp. III 1985)).

<sup>206</sup>Defense Procurement Reform Act of 1984, Pub. L. 98-525, 98 Stat. 2588 (codified as amended at Title 10 §§ 139 note, 139a, 139b, 2301 note, 2302, 2303a, 2305, 2311, 2317-2322, 2354a, 2384, 2384a, 2392 note, 2401-2405, 2411-2416, 2452 note (Supp. III 1985)).

<sup>207</sup>Small Business and Federal Procurement Competition Enhancement Act of 1984, Pub. L. No. 98-577, 98 Stat. 3066 (codified as amended at Title 10, §§ 2302, 2303a, 2304, 2310, 2311; Title 15, §§ 637, 644; Title 41, §§ 251 note, 253, 253b-253g, 259, 403, 414a, 416, 418a, 418b, 419 (Supp. III 1985)).

<sup>208</sup>10 U.S.C. §§ 2320-21 (Supp. III 1985).

<sup>209</sup>The numerous bid protests to GAO by disaffected contractors protesting sole source procurements by Government agencies confirm the perception that competition is often lacking in Government procurement. See Comp. Gen. Dec. B-190798, B-191007 (13 June 1978), 78-1 CPD para. 431; Comp. Gen. Dec. B-187902 (24 May 1977), 77-1 CPD para. 362.

<sup>210</sup>The Defense Logistics Services Center publishes and distributes every quarter a summary status report. The report includes information concerning spare parts procurement, such as whether the parts were obtained competitively or noncompetitively. If obtained noncompetitively the circumstances that limit procurement to sole sources are listed. Statistics for the five years previous to

were made noncompetitively due to a lack of emphasis on competition and cost effectiveness.<sup>211</sup> Although small businesses in particular complained that they were excluded from competing in many Government contracts because the Government could not provide them with the data to manufacture a particular part, Congress found that this did not cause the lack of competition. First, possession of the data would not ensure production of an equivalent part of the quality level supplied in the past. Experience, expertise, and technological ability also play a part. More significantly, Congressional inquiry revealed that it was an inability to retrieve data that the Government was authorized to use and to provide that information to a prospective contractor that impeded competition.<sup>212</sup> Thus, the Government's failure to challenge a contractor's unauthorized assertion of proprietary data, or failure to demand delivery of rights to which it was entitled, or failure to properly code supplies proved to be the primary causes of the restraints upon competition.

The statutory provisions are divided into two sections. The first defines rights in technical data<sup>213</sup> and the second prescribes the validation of proprietary data restrictions.<sup>214</sup>

### **A. DEFINING RIGHTS IN DATA IN TITLE 10, UNITED STATES CODE**

In defining rights in technical data, Congress went far beyond past legislation in specifying the instances in which the Government would acquire unlimited rights in technical data. Congress directed the Secretary of Defense to define by regulation the "legitimate proprietary interest of the United States and of a contractor in technical or other data." Rather than give the agencies free hand in drafting applicable regulations as it had in the past, Congress required that there be only one set of regulations<sup>215</sup> and specified the guidelines to implement them. Congress had in the past given the defense agencies blanket authority to promulgate regulations in any manner they saw fit.

1984 revealed that less than 3% of the total items were obtained from a designated source due to proprietary restrictions.

<sup>211</sup>H.R. Rep. No. 690, *supra* note 6, at 11.

<sup>212</sup>*Id.*

<sup>213</sup>10 U.S.C. § 2320 (Supp. III 1985).

<sup>214</sup>10 U.S.C. § 2321 (Supp. III 1985).

<sup>215</sup>The regulations were to be part of the Federal Acquisition Regulations (FAR) system, which is the current Government regulation applicable to all Government agency acquisitions. The FAR superseded the Federal Procurement Regulations (FPR) and the Defense Acquisition Regulations (DAR) on 1 April 1984.

This resulted in variances in policy toward technical data rights. An Air Force initiative provided that contracts within the Air Force Systems Command containing limited data rights clauses could not reserve limited rights for more than 60 months. After 60 months the Air Force took unlimited rights in the data.<sup>216</sup> The Navy required contracts be written with options included to acquire unlimited rights in data should acquisition prove beneficial to the Government.<sup>217</sup> The Army had no fixed policy, so each procuring agency took whatever steps it deemed appropriate in obtaining and using technical data.<sup>218</sup> Among the civilian agencies, the policy in NASA and Department of Energy was to take title to technical data rights in big item contracts.<sup>219</sup>

Perhaps because of these divergencies in policy, Congress decreed that the regulations would be uniform and would incorporate the best features of the various services' approaches. Congressional findings and policy concerning technical data in the Reform Act advocated reexamining policies relating to spare parts procurement and technical data related to such parts; and ensuring that sale of technical data did not become a prerequisite to doing business with the Department of Defense. The reforms advocated went far beyond these modest goals.

### 1. *New Regulations to Define Critical Concepts.*

The first directive in 10 U.S.C. § 2320 is that regulations define when data is developed exclusively with federal funds; exclusively at private expense; or in part with federal funds and in part at private expense.<sup>220</sup>

Definition of these terms by regulation would enumerate those instances in which the Government obtains unlimited rights in data and when a contractor may place limited rights restrictions on data. When these terms are defined, the history of complex litigation in technical data rights may be over. Disputes concerning whether data was developed at private expense or with federal funds or both, and if developed with both private and federal funds whether the Government takes unlimited rights would be firmly guided by regulation. Similarly the questions concerning ownership rights in Government-funded modifications would be addressed by regulation.

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<sup>216</sup>Raubitschek, *Recent Developments in Government Patent and Data Policy*, *The Army Lawyer*, Mar. 1986 at 59.

<sup>217</sup>*Id.*

<sup>218</sup>*Id.*

<sup>219</sup>*Id.*

<sup>220</sup>10 U.S.C. § 2320(a)(1) (Supp. III 1985).

This direction to address a complex and troublesome aspect of Government contract law indicates an activist attitude by Congress in formulating procurement policies. It is also a indication that the policy pendulum has shifted. No longer is the protection of private investment of resources the paramount concern. Congress is clearly troubled by contracts with hidden escalating costs to the Government. The new emphasis is upon using Government purchasing power wisely by not paying for items which the Government already owns and by being aware at the outset of negotiations what exactly the Government is contracting to buy. The need to be aware of bottom line expenditures is tempered by incorporation into the statute of other policy objectives which recognize that innovation and diversity is encouraged by the participation of small businesses and alternate sources of supply in Government procurement.<sup>221</sup>

*2. Mandatory Contract Clauses to be Included in Supply and Service Contracts.*

Congress prescribed that regulations include contract clauses to be used in supplies and services contracts, including clauses

1. defining the respective rights of the United States and the contractor or subcontractor (at any tier) regarding any technical data to be delivered under the contract;
2. specifying the technical data, if any, to be delivered under the contract and delivery schedules for such delivery;
3. establishing or referencing procedures to determine the acceptability of technical data to be delivered under the contract;
4. establishing separate contract line items for the technical data, if any, to be delivered under the contract;
5. to the maximum practicable extent, identifying, in advance of delivery, technical data which is to be delivered with restrictions on the right of the United States to use such data;
6. requiring the contractor to revise any technical data delivered under the contract to reflect engineering design changes made during the performance of the contract that affected the form, fit and function of the items

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<sup>221</sup>*Id.* at § 2320(a)(2-4)

specified in the contract and to deliver such revised technical data to an agency within a time specified in the contract;

7. requiring the contractor to furnish written assurance at the time the technical data is delivered or is made available that the technical data is complete and accurate and satisfies the requirements of the contract concerning technical data;

8. establishing remedies to be available to the United States when technical data required to be delivered or made available under the contract is found to be incomplete or inadequate or to not satisfy the requirements of the contract concerning technical data; and

9. authorizing the head of the agency to withhold payments under the contract (or exercise such other remedies as the head of the agency considers appropriate) during any period if the contractor does not meet the requirements of the contract pertaining to the delivery of technical data.<sup>222</sup>

The first five contract clauses are designed to focus attention on technical data at the outset of the bargaining process rather than at the end. This makes good sense from both the Government and contractors' viewpoint. To define rights, specify data, and establish procedures early in the contracting process is beneficial to the Government because it is at that point when competition is the greatest. When the Government awards a contract for a major systems acquisition, there will be many contractors competing for the award. The Government's bargaining position is the strongest and the contractor may be willing to make concessions concerning future rights in data in order to be awarded a valuable contract. If rights in data are not clarified until after the contractor has commenced performing the contract the contractor has no incentive to accord the Government any rights in protected data. In fact, it would be adverse to the contractor's interests to do so; by keeping technical know-how secret, the contractor may insure future procurement on a sole-source basis. While the new provisions on one hand have an adverse impact upon contractors who have in the past depended on sole source business, the provisions on the other hand provide enhanced opportunities for more diverse competition, thus possi-

<sup>222</sup>*Id.* at § 2320.

bly benefitting a greater number of contractors.<sup>223</sup> By focusing the contractor's attention on the nature and quality of the technical data rights being offered for sale before the contract is signed, the new provisions encourage higher initial prices. With fewer ensuing changes and less resulting litigation generated by the new statutory requirements, the Government should still realize a savings.

The separate line item for data seems to be statutory approval of the Navy's policy of including an option for the purchase of data. Certainly data is not required to be purchased in every case, particularly when the product is commercially available.

The contract clause concerning Government-funded modifications is a new position. This clause would grant the Government unrestricted use of any revisions, changes, and modifications to data previously obtained with unlimited rights. This clause would insure that the Government receives the most current data on an item.<sup>224</sup> The clause would act as a guarantee that previously available data is not changed slightly and, with ensuing limited rights prescriptions, made unavailable to the Government.

The most controversial new requirement is the contract clause requiring the contractor to warrant that data conforms to the requirements stated in the contract. A even more controversial proposal was omitted which would have required a contractor to certify that the data described as such was in fact developed at private expense. The warranty provision as enacted places a continuing obligation on the contractor to guarantee completeness and accuracy of technical data. The Government reserves the right to require correction of the data at any time, in spite of its prior acceptance of the data.<sup>225</sup>

The remaining contract clauses are remedy-granting clauses available to the Government should the contractor deliver inaccurate or incomplete data. The head of an agency is authorized to withhold payment under the contract should the contractor be delinquent in performing any of its obligations pertaining to the delivery of technical data.

### *3. Expiration Period Set for Limited Rights Assertions.*

The final new directive in the technical data rights portion of

<sup>223</sup>Breedlove and Kintisch, *Surviving the New 1984 Procurement Laws: Risks and Opportunities for Government Contractors*, Program Manager, Jan-Feb. 1985.

<sup>224</sup>H.R. Rep. No. 690, *supra* note 6, at 15.

<sup>225</sup>*Id.* at 21.



the statute appears to approve the Air Force's initiative to reduce the lifetime of limited rights assertion to sixty months. The Secretary of Defense is directed to institute a regulation setting standards for determining whether limited rights can include an expiration point, not to exceed seven years, on any proscription on the Government's unlimited use of technical data. After seven years the Government could make unrestricted use of the data. While technology usually is not current after seven years, this provision, when applied in conjunction with the contractor's obligation to keep data current, could prove a valuable right to the Government in multiyear, major systems acquisitions contracts.

### ***B. Validation Procedures For Limited Rights Assertions***

The second statutory section which establishes procedures for challenging proprietary legends is entitled "Validation of Proprietary Data Restrictions."<sup>226</sup> In order to prevent contractors from marking all their designs and drawings with proprietary legends, as occurred in *Megapulse*, Congress has placed restrictions on the right of contractors to mark data, and has codified the means of challenging the marked data. The contractor has the burden of validating the challenged data. In a unique provision, the contractors may be assessed court costs if they cannot justify their legends.

#### ***1. Initial Analysis Requirements.***

The challenge or validation procedure expressed in 10 U.S.C. § 2321 is much more complicated than in any preceding regulatory provisions. Congress, in section 2321(a), required that service or supply contracts for the delivery of technical data must provide that a contractor or subcontractor at any tier shall be prepared to furnish to the contracting officer a written justification for any restriction asserted by the contractor or subcontractor on the right of the United States to use such technical data; and the contracting officer may review the validity of the restriction asserted by the contractor or by a subcontractor under the contract on the right of the United States to use technical data furnished to the United States under the contract if the contracting officer determines that reasonable grounds exist to question the current validity of the asserted restriction and that the continued adherence to the asserted restriction by the United

<sup>226</sup>10 U.S.C. § 2321 (Supp. III 1985).

States would make it impracticable to procure the item competitively at a later time.<sup>227</sup>

The first statutory provision codifies the GAO holding in *Megapulse*.<sup>228</sup> The burden is placed upon the contractors initially to scrutinize data and select out that data to which they will assert limited rights protection. The contractor may not make a blanket assertion of proprietary data rights over an entire data package and let the Government sort out the proprietary from nonproprietary data. From the contractor's point of view, this provision will prove expensive and time-consuming.

The second contract clause directs an ongoing review process by the Government. The burden to stay current is placed on the Government to determine if data which was once protected has since become a matter of public knowledge, reverse engineered, or delivered to the Government under another contract without restrictions. This requirement bespeaks the need for an information retrieval system to insure that data rights are not needlessly limited due to the Government's negligent failure to assert rights which it already possesses. Although such an information-coding and retrieval system will undoubtedly prove costly to the Government initially, costs may be recouped when the item is procured competitively in the future. The contracting officer must make a conscious determination early in the contracting process whether the restrictions are justified and whether the restrictions would impede later competitive reprocurments.

## 2. Government Challenge Procedures.

Section 2321(b) of the validation procedure guides the contracting officer's action after the review process is completed. The contracting officer must determine that a good faith basis exists to challenge the asserted rights. This is a departure from prior practice when blanket assertions of proprietary rights was the rule. Formerly, the Government could routinely send out challenge letters just to see what action the contractor would take on receipt of the letter. The vague terms of the former letters have also been brought into sharper focus as the new statute directs the letter must specify the grounds for challenging the asserted restriction; and the requirement for a response within 60 days justifying the current validity of the asserted restriction.<sup>229</sup>

<sup>227</sup>*Id.* § 2321(a).

<sup>228</sup>Comp. Gen. Dec. B-194986 (15 Jan. 1980), 80-1 CPD para. 42.

<sup>229</sup>10 U.S.C. § 2321(b)(1), (2) (Supp. III 1985).

The letter serves as official notice to the contractor that the Government is questioning the contractor's right to the data and gives the contractor sixty days to respond. Section 2321(c) of the validation procedures addresses the contractor's dilemma if he cannot adequately respond to the challenge within sixty days. The contractor may submit a written request for extension which details the need for additional time. The contracting officer shall grant additional time as appropriate. If the contractor has received challenge notices from more than one contracting officer, each contracting officer must be notified of the other challenges. The contracting officer who issued the first challenge shall consult with the contractor and other challenging contracting officers and arrange a response schedule, allowing adequate time to formulate each response.

Section 2321(d) provides that if the contractor fails to respond the contracting officer "shall issue a decision pertaining to the validity of the asserted restriction."<sup>230</sup> This provision clarifies the procedural steps to be followed to culminate in the possible removal of restrictive markings. The contracting officer issues a final decision if the contractor fails to respond to the request for justification. By tying the action to a final decision by the contracting officer the matter becomes a contract dispute rather than an independent cause of action in federal district court. If the contractor subsequently wants to dispute the technical data rights assertion, he could not assert that the matter was unrelated to a contract action as the contractor in *Megapulse* did.

### 3. Contractor Justification of Limited Rights Assertion.

After the contractor submits a justification for its assertion of limited rights in response to the Government's written notice, the Government has sixty days in which to decide whether the justification is valid. This is an entirely new provision which should greatly speed the resolution of disputes in technical data. Previously, there was no time limit placed on Government action. If the contracting officer determines the contractor does not possess the claimed proprietary data rights, he will either issue a final decision or notify the contractor of when a final decision will be reached within sixty days.

Section 2321(e) provides that if a contractor submits a claim for payment for asserted limited data rights the "claim shall be considered a claim within the meaning of the Contract Disputes

<sup>230</sup>*Id.* § 2321(d)(1).

Act of 1978."<sup>231</sup> This section reiterates Congressional intent to introduce uniformity into the settlement of data rights claims. Pursuant to the Contracts Disputes Act, contractors have the option of pursuing their claims before the board of contract appeals or Claims Court. This provision provides additional support to the probable Government position that disputes concerning technical data rights are essentially contract claims, not sustainable as a noncontract cause of action.

#### 4. *Deciding the Claim.*

The final section, 10 U.S.C. § 2321(f), is both new and unique. First, it provides that the limited rights legend may be removed and restrictions cancelled on the Government's right to use and disclose data if litigation pursuant to the Contracts Disputes Act results in a favorable Government decision.<sup>232</sup> The most controversial section of the statute provides:

[I]f the asserted restriction is found not to be substantially justified, the contractor or subcontractor, as appropriate, shall be liable to the United States for payment of the cost to the United States of reviewing the asserted restriction and the fees and other expenses (as defined in section 2412(d)(2)(A) of title 28) incurred by the United States in challenging the asserted restriction unless special circumstances would make such payment unjust.<sup>233</sup>

This provision requiring the contractor to reimburse the Government for the cost of challenging the assertion of limited rights is a compromise. Originally it was proposed that the contractor pay liquidated damages.<sup>234</sup> When the legislation was enacted, this provision was dropped as was the certification requirement verifying that items claimed with limited rights were in fact developed at private expense.<sup>235</sup> In order to be liable for costs, the contractor's claim must lack substantial justification. Although no standard is supplied to give meaning to the term, substantial justification seems to imply a preponderance of the evidence standard. The requirement to pay costs is tempered by an exception when payment would be unjust due to special circumstances.

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<sup>231</sup>*Id.* § 2321(e).

<sup>232</sup>*Id.* § 2321(f)(1)(A).

<sup>233</sup>*Id.* § 2321(f)(1)(B).

<sup>234</sup>H.R. Rep. No. 690, *supra* note 6, at 7.

<sup>235</sup>*Id.*

If the dispute is settled in favor of the contractor, the restrictions remain in place and the Government may be liable to reimburse the contractor for defending the action. The Government is only liable for reimbursement of costs, however, "if the challenge by the United States is found not be made in good faith."<sup>236</sup> Lack of good faith implies a much higher degree of proof than lack of substantial justification. Bad faith seems to place on the contractor an even greater burden than the clear and convincing standard of proof, that of showing that the contracting officer knew or should have known that the contractor's assertion was valid.

## IX. THE LATEST REGULATORY REVISIONS

### A. *THE PROPOSED REVISIONS*

The changes in technical data rights treatment directed by statute were applicable to solicitations issued one year after 19 October 1984. Regulatory revisions were, therefore, necessary by 18 October 1985. The successor to the ASPR Committee, the Defense Acquisition Regulatory (DAR) Council, as the body responsible for promulgating the Department of Defense Federal Acquisition Regulation Supplement (DFARS), issued a set of proposed rules and a request for public comment on 10 September 1985.<sup>237</sup> Written comments on the proposed rules were due by 9 October 1985.

The policy statement introducing the proposed revisions reflects a new resolve to lower prices and commitment to involve greater competition in the Government contracting process. The revisions mark a further shift away from protecting private investment interests to protecting the public fisc. Although the new policy reaffirms the Government's intention to only acquire essential technical data rights (now enlarged to include rights in computer software) those essential requirements are expanded to include the interest of the United States in increasing competition and lowering costs by developing and locating alternative sources of supply and manufacture.<sup>238</sup>

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<sup>236</sup>10 U.S.C. § 2321(f)(2)(B) (Supp. III 1985).

<sup>237</sup>Amendments to Department of Defense Federal Acquisition Supplement; Technical Data, 50 Fed. Reg. 41,180 (1985) (containing proposed revisions of 48 CFR §§ 227 and 252) [hereinafter 48 CFR § \_\_\_\_\_ proposed revision]

<sup>238</sup>48 CFR § 227.472(a) proposed revision.

The proposed revisions included a complete reworking and reorganization of Department of Defense Federal Acquisition Regulation Supplement (DFARS) Subpart 227.4 and related clauses in DFARS Part 252. The reorganization was designed to group related topics closer together to provide greater clarity.

*1. Definition of Developed at Private Expense.*

The most significant change is inclusion for the first time of a definition of the phrase "developed at private expense:"

"Development at private expense" as used in this subpart, means that completed development was accomplished without direct Government payment, at a time when no Government contract required performance of the development efforts, and was not developed as a part of performing a Government contract. The word "developed," as used in the phrase "developed at private expense," means brought to the point of practical application, i.e., to be considered "developed" an item must have been constructed, a process practiced, or computer software used, and in each case it must have been tested so as to clearly demonstrate that it performs the objective for which it was developed. When, in applying these criteria, an item, component, process, or software package does not meet the test because the entire item, component, process, or software package was not developed at private expense, separate elements thereof which do meet the criteria will be considered to have been developed at private expense. Further, in applying the foregoing criteria, when an item, component, process or computer software which has been developed at private expense is modified or revised to meet Government requirements specified in a contract, modification of the item, component, process or computer software shall not be considered to have been developed at private expense.<sup>239</sup>

The requirement that "completed development" be accomplished without Government payment seems to encompass the situation in *Bell Helicopter Textron*<sup>240</sup> where development of the TOW helicopter launcher could be divided into portions, some of which were funded by the Government and some which were not. The regulation confirms the result in *Bell*: the contractor could not

<sup>239</sup>48 CFR § 227.471 proposed revision.

<sup>240</sup>ASBCA No. 21192, 85-3 BCA para. 18,415.



claim development at private expense for the entire launch system.<sup>241</sup>

The direct payment provision leaves open the question of what result obtains when the Government reimburses costs for an invention or discovery. A Government contract may reimburse independent research and development costs and this may be considered an indirect payment under the contract. The longstanding Government policy has been that despite this reimbursement the contractor may claim that development was wholly with private funds.<sup>242</sup> Now this policy may be undermined by the new regulation. The policy of reimbursing overhead and normal and necessary business expenses of independent research and development contracts while allowing contractors to retain full data rights has been justified in the past as a necessary incentive to encourage defense-related technologies. Army undersecretary James Ambrose has expressed a concern that this policy has been abused by defense contractors who have obtained background proprietary rights to data which should have belonged to the Government.<sup>243</sup> Challenges against the policy have been launched in the past, notably by the Air Force and Navy in the mid-1970's but to no avail.<sup>244</sup> The new regulatory language "accomplished without direct Government payment"<sup>245</sup> arguably encompasses reimbursement for independent research and development, but this will depend upon whether the reimbursement is considered direct payment.

The regulations contain directions on how to obtain the unlimited rights to use complete data or severable portions of data. The terms of the regulation recognize that separate elements or subassemblies may still be protected by limited rights warnings. The regulation in subsequent sections provides practical suggestions for both obtaining data and protecting severable interests in data: specific acquisition of unlimited rights,<sup>246</sup> acquisition of licensing rights by the Government,<sup>247</sup> licensing requiring the contractor to develop alternate sources,<sup>248</sup> inclusion of options

<sup>241</sup>*Id.* at 92,423.

<sup>242</sup>*Id.*

<sup>243</sup>*Inside the Pentagon*, Vol. 2, No. 7, at 1 (Feb. 14, 1986).

<sup>244</sup>*Id.* at 9.

<sup>245</sup>48 CFR § 227.472 proposed revision.

<sup>246</sup>48 CFR § 227.473-2(a) proposed revision.

<sup>247</sup>48 CFR § 227.473-2(b) proposed revision.

<sup>248</sup>48 CFR § 227.473-2(c) proposed revision.

in the contract<sup>249</sup> and an expiration point for protection of rights in the data.<sup>250</sup>

Despite the guidance contained in the proposed regulation, the contracting officer may be unaware of protected data rights at the time of issuing a solicitation, particularly until an information-coding system is in place. The existence of severable rights in data may result in contractors being given Government-furnished data without notice of the severable rights, thus causing the contractor to claim costly changes. The extent to which contractors succeed in their claims will depend upon the extent to which the Government has guaranteed its data as complete. Therefore, when issuing solicitations, contracting officers must be wary of warranting the completeness of Government-supplied technical data packages.

The regulations contain extremely rigorous testing requirements. The item must be both in existence and have been tested to "clearly" demonstrate that it will perform the objective for which it was developed. The terms of the regulation do not specify whether simulated or actual conditions testing is required, but by placing the standard as a clear demonstration of function, the regulation implies actual conditions testing is required. This means that the Bell X-1 aircraft which was privately funded until its first test flight would not have qualified as developed at private expense. The breaking of the sound barrier was the objective for which a supersonic aircraft was developed and this test was performed under military control. Therefore, the Bell X-1 was not developed at private expense under the proposed criteria.

The regulation uses the term "brought to the point of practical application"<sup>251</sup> which seems synonymous with patent law terminology of "actual reduction to practice" as espoused in *Bell Helicopter Textron*.<sup>252</sup> By avoiding complete identification with patent law terminology the drafters of the regulation avoid confusion with patent law and allow for interpretation unique to the technical data rights field.

Modifications, revisions, or improvements in technical data which are necessary to meet Government requirements are not considered as developed at private expense. Thus, the Government may own rights to a severable portion of data. The

<sup>249</sup>*Id.*

<sup>250</sup>*Id.*

<sup>251</sup>48 CFR §§ 227-471 proposed revision.

<sup>252</sup>See *Bell Helicopter Textron*, 85-3 BCA at 92,422.

treatment of severable rights in the data, not addressed in terms of the regulation, will inevitably be a ripe area for conflict in the future. Under the proposed regulations either the contractor or the Government may hold rights to a severable portion of a larger body of information. Identifying the smaller sections of data to be afforded protection is a matter the proposed regulations do not address directly. Various techniques are listed for obtaining technical data rights: direct payment, licensing, options and negotiating a time limitation upon limited or restricted rights. These techniques may prove difficult to apply to severable rights in data as the Government and contractor cannot agree at the beginning of contract performance as to the nature of these rights because the severable data rights issues will arise during the course of contract performance.

## 2. *Certification Requirements.*

The regulation requires mandatory certifications of technical data under two circumstances: to identify data in a negotiated contract which may already be owned by the Government and to certify that data delivered under any contract is complete, accurate, and correct.<sup>253</sup>

The Certification of Technical Data—Prior Delivery clause has the potential to have harsh consequences for contractors. All negotiated contracts are required to have a clause certifying whether the same information has been delivered or is obligated to be delivered to the Government under any contract or subcontract.<sup>254</sup> This will enable the Government to keep track of those items to which it already owns unlimited rights in data and will also alert the Government to the types of data to which it needs to acquire unlimited rights. The contractor is required to identify the contract or subcontract under which the data was delivered and the place of delivery of the data. This will place an enormous record-keeping responsibility upon a contractor who does a great deal of business with the Government.

The Certificate of Technical Data Conformity clause carries the biggest threat to the contractor, however, because it requires the contractor to certify in writing that the technical data delivered is complete, accurate, and complies with the requirements of the contract.<sup>255</sup> This is an absolute guarantee. If the data is found not to be of the requisite completeness or accuracy, "the contracting

<sup>253</sup>48 CFR § 227.474-3 proposed revision.

<sup>254</sup>48 CFR § 227.474-3(a) proposed revision.

<sup>255</sup>48 CFR § 227.474-3(b) proposed revision.

officer shall consult with counsel regarding possible civil remedies and criminal sanctions available to the Government." The harshness of this provision can best be illustrated by comparing it with the interim provision which requires certification only to the best of the contractor's knowledge and belief and contains no civil or criminal penalty provisions.<sup>256</sup>

Other less controversial changes included refining the definition of limited rights to allow independent third party review for Government evaluation purposes;<sup>257</sup> revising the predetermination of rights procedures, renaming them the "prenotification of rights in technical data and computer software;"<sup>258</sup> defining license rights with accompanying guidance on the acquisition of license rights; and the directed licensing of technology.

### 3. Defense Contractors Oppose Revisions.

Contractor resistance was stiff to the "hard-nosed" proposed regulatory provision.<sup>259</sup> The DAR Council held a public meeting on 1 October 1985 to hear comments on the new regulations. The meeting was attended by over 40 representatives of industry, Congressional staff, the press, and the Government. A major topic of discussion was that the public comment period had been too short in view of the extensive reorganization and revision of the regulations.

## B. THE INTERIM REVISIONS

As a result of the meeting and the comments generated by the proposed revisions, a decision was reached not to implement the revisions. Instead, the public comment period was extended until 9 January 1986.<sup>260</sup> For the meantime, an interim revision incorporated the minimal statutory requirements of the Reform Act and the Procurement Improvement Act. The controversial portions were omitted or softened and the reorganization of the DFARS dropped. The interim rules were not intended to generate additional public comment, but merely to minimally cover statutory requirements until a final version of the technical data rights regulation was implemented.

<sup>256</sup>Amendments to Department of Defense Federal Acquisition Regulation Supplement; Technical Data, 50 Fed. Reg. 43,158 (1985). (To be implemented on an interim basis) (hereinafter 48 CFR § \_\_\_\_ interim rule). 48 CFR § 227.403-2(b)(1) interim rule.

<sup>257</sup>48 CFR § 227.470(b) proposed revision.

<sup>258</sup>48 CFR § 227.473 proposed revision.

<sup>259</sup>85-22 The Government Contractor's Communique 1.

<sup>260</sup>50 Fed. Reg. 41,180 (1985).

Noticeably absent from the interim revisions is a definition of "developed at private expense." As mentioned above, the contractor does not warrant the accuracy of his data and is not subject to criminal or civil penalties for a failure to include accurate and complete data. Remedies for noncomplying technical data are limited to normal contractual remedies, such as reduction of progress payments, withholding, termination, and decrease in contract price or fee.

### *1. Developing Second Sources of Supply.*

The interim rules do nonetheless grant substantial rights to the Government in the acquisition of technical data. The interim rules grant the head of an agency, on a nondelegable basis, the right to demand unlimited rights in data developed at private expense. When the interests of the United States in increasing competition and lowering costs are served by developing second sources of supply, the head of the agency may require the data and rights as necessary.<sup>261</sup>

The contracting officer may consider the contractor's willingness to supply data as a factor in source selection.<sup>262</sup> He shall consider requiring alternate proposals to enhance competition that (1) grant the Government the right to use technical data provided under the contract for competitive procurement purposes or (2) propose the qualification or development of alternative sources of supply.<sup>263</sup>

### *2. Prenotification, Certification, and Validation.*

In order to assist the Government in making informed judgments regarding reprourement of items developed at private expense, the offeror of such items must identify whether they intend to deliver the pertinent data with (1) limited rights, (2) unlimited rights, or (3) to be determined later.<sup>264</sup> The Government's failure to object to limited rights assertion at this point is not a waiver of the right to challenge. When a prenotification of rights clause is included in the contract the contractor is obliged to notify concerning limited rights only once.<sup>265</sup>

The requirements for certification and validation of technical data are implemented on a mandatory basis for inclusion in the

<sup>261</sup>48 CFR § 227.403-2(a)(3)(i) interim rule.

<sup>262</sup>48 CFR § 227.403-2(a)(3)(ii) interim rule.

<sup>263</sup>48 CFR § 227.403-2(b) interim rule.

<sup>264</sup>48 CFR § 227.403-2(i) interim rule.

<sup>265</sup>48 CFR § 227.403-2(ii)(2) interim rule.

contract.<sup>266</sup> The validation requirements impose on the contractors the duty to maintain records to justify the validity of markings. The defense industry views the record-keeping requirement as a special problem. When data was generated in the past requisite records may not have been kept, and it may prove difficult or even impossible to reconstruct them. The lack of a system to trace rights in data, in the past, may give contractors difficulties in tracing records kept for "old" data. The records must be delivered within thirty days of demand as part of the validation procedure.<sup>267</sup> Aside from the record-keeping provision, the regulations follow statutory provisions closely concerning procedures to be followed in challenging and validating restrictive markings.

### *3. Cancelling or Ignoring the Restrictive Legend.*

The regulations provide greater detail to statutory requirements in setting out procedures to be followed when the contractor files a claim regarding alleged limited rights protections violations. The Government will continue to observe limited rights restrictions for ninety days after a final decision by the contracting officer that data is not entitled to limited rights protection. If the contractor has not provided notice of an intent to file suit within ninety days, the Government may cancel or ignore the restrictive markings.<sup>268</sup> If, after having provided notice of intent to file, the contractor fails to file its suit within one year, the restrictive markings may be cancelled or ignored. Under urgent or compelling circumstances, the head of an agency may determine on a nondelegable basis that the markings will be cancelled or ignored as an interim measure pending the filing of suit or the expiration of the one-year waiting period.<sup>269</sup> If an action is filed before the Claims Court or the Armed Services Board of Contract Appeals, an agency head may, if the contractor fails to actively pursue its appeal or if urgent and compelling circumstances continue to exist, cancel or ignore markings as an interim measure.<sup>270</sup>

## **X. CONCLUSION**

The interim revisions will remain in place until the new regulations are implemented later in 1986. Whether the proposed revisions are adopted as currently composed will depend upon the

<sup>266</sup> 48 CFR § 227.412(w) interim rule.

<sup>267</sup> 48 CFR § 227.413-1(b)(3) interim rule.

<sup>268</sup> 48 CFR § 227.413(d)(2)(ii)(B) interim rule.

<sup>269</sup> 48 CFR § 227.413-1(d)(2)(ii)(C) interim rule.

<sup>270</sup> 48 CFR § 227.413-1(d)(2)(ii)(D) interim rule.



extent to which the Government's interests prevail over the interests of the defense industry. The Government's interests primarily lie in interjection of greater competition into the contracting process. Greater competition means a larger number of contractors will participate in Government contracts. This will result in lower prices, as well as an expansion of the industrial base. Estimates of the costs savings to be realized by converting from sole source to competitive procurement range between twenty-five and fifty-four percent.<sup>271</sup> In one startling example, the Air Force, by allowing competition and buying in larger quantities, managed to reduce the cost for the outer wing-tip skins for F-4 fighters from \$2,066 to \$194 apiece.<sup>272</sup>

The proposed changes will force the contractors and the Government to be specific in detailing what the purchaser is seeking and what the seller is offering. Both parties will benefit from a closer "meeting of the minds" in the contracting process and disputes will be fewer. One problem not addressed by the revisions is the situation when one competitor has data and offers it for sale while another competitor does not have the data and does not include provision for payment in the contract price. The owner of the data will be the higher bidder while the low bidder may not be aware of the cost of procuring the technical data. The contractor must proceed cautiously when bidding on contracts involving technical data in order not to be underbid by another contractor who does not have the data. Contracting officers will have greater responsibility to identify and preserve government interests in technical data acquisition. Bargaining for data will be equally important as the bargaining for the item or process itself when procurement or spare part costs are predicted to be substantial.

The primary benefit to the Government in acquiring the technical data necessary to allow competitive procurement is the cost savings resulting from competition and the invigoration of the industrial base. The danger is that contractors will be unwilling to participate due to their potential liability for conveying defective data and due to the complexity of charting the rights in technical data. Finally, initial implementation of the new regulations will prove expensive to both the contractor and the Government. A six billion dollar computer modernization program, the Logistics Management System, is part of a military-

<sup>271</sup>Sellers, *Second Sourcing: A Way to Enhance Reduction Production*, Program Manager, May-June 1983.

<sup>272</sup>Washington Post, *supra* note 5.

wide effort to store and retrieve procurement information. Richard E. Carver, Assistant Air Force Undersecretary, projects that the system will tell an item manager what the code symbol is in real terms, i.e., a hammer, how many are on hand, how much was paid for the item last year, and how many vendors can make them. The drawings and manuals will be provided also to constitute a "seamless" system for supporting and repairing complex systems. The "seamless" system envisioned by the assistant undersecretary depends upon the procurement of substantial amounts of technical data.<sup>273</sup> If the military is to attain the logistic capability to account to the public for increasingly costly and complex weapons systems, the "hard-nosed" regulatory provisions initially proposed should be implemented. The Government has increasing need to identify first, exactly what its requirements are, and second, whether the means to satisfy its requirements already lies within its grasp. Therefore, the proposed definition of "developed at private expense" should be implemented to incorporate the patent law concepts enunciated in *Bell Helicopter Textron*<sup>274</sup> and in the proposed regulatory revisions. However, the definition should go beyond that to make explicit the Government's ownership of data paid for by Government reimbursement of independent research and development contract costs. The regulations as implemented should ensure that the Government receives unlimited rights in technical data when the Government pays, directly or indirectly, any of the costs of development.

## APPENDIX A

### ASPR §§ 9.201-9.203 (9 Apr. 1957)

§ 9.201 *Rights in Data Unlimited*. (a) Generally "operational data" and "design data" should satisfy Government requirements. Further, data shall not be acquired for other than Governmental purposes. The price for such data may be listed separately from the price for other items being purchased in the contract.

(b) *Supply contracts*. In advertised contracts and in contracts for standard commercial items, "proprietary data" should not be requested. "Proprietary data" will be obtained under contracts for other than standard commercial items only when a clear Government need for such data is established. When "proprietary data" is so obtained, there shall be a specific negotiation for such data

<sup>273</sup>*Id.*

<sup>274</sup>ASBCA No. 21,192, 85-3 BCA para. 18,415.

and the contractual requirement shall be listed as a separate contract item.

(c) *Contracts for experimental, developmental, or research work.* In a contract which has as one of its principal purposes experimental, developmental, or research work and also calls for models of equipment or practical processes, the contractor shall be required to furnish all data necessary to enable manufacture of the equipment or performance of the process; except that such data need not be required for standard commercial items to be furnished under the contract and to be incorporated as component parts in or to be used with the product being developed if, in lieu thereof, requirement is made for identification of source, and performance specifications and characteristics sufficient to enable the Government to procure from any supplier the part or an adequate substitute. Under such a contract the Government is entitled to all data resulting from performance thereunder. Any previously developed "proprietary data" should be required only where the product could not readily be manufactured or the process performed without the use of such "proprietary data."

§ 9.202-2 *Use of data*—(a) *Operational and design data.* Since "operational data" and "design data" as defined above do not call for the disclosure of details of the contractor's trade secrets or manufacturing processes which the contractor has the right to protect, such data should be obtained without any limitation as to its use by the Government.

(b) *Proprietary data*—(1) *Contracts for experimental, developmental, or research work.* When "proprietary data" is obtained under a contract having as one of its principal purposes experimental, developmental, or research work, in accordance with § 9.202-1(c), it shall be obtained without limitations as to its use.

(2) *Supply contracts.* When "proprietary data" is obtained by negotiation under a supply contract in accordance with § 9.202-1(b), the purpose for obtaining it will govern its use. If it was obtained for the purpose of enabling the Government to establish additional sources of supply, it should be obtained without limitation as to its use. Where, however, it has been determined to be necessary to obtain "proprietary data" for some limited purpose, such as emergency manufacture by the Government, such data may be obtained subject to limitation as to its use. In such cases the contract clause contained in § 9.203-2 shall be included in the contract and the contract Schedule shall specifically identify the data which shall be subject to limited use.

§ 9.203-1 *Unlimited rights to use data.***RIGHTS IN DATA—UNLIMITED**

(1) the term "Subject Data" as used herein includes writings, sound records, pictorial reproductions, drawings or other graphical representations, and works of any similar nature (whether or not copyrighted) which are specified to be delivered under the contract. The term does not include financial reports, cost analyses and other information incidental to contract administration.

(b) Subject to the proviso of (c) below, the Government may duplicate, use, and disclose in any manner and for any purpose whatsoever, and have others so do, all Subject Data delivered under this contract.

(c) The Contractor agrees to and does hereby grant to the Government and to its officers, agents, and employees acting within the scope of their official duties, a royalty-free, non-exclusive and irrevocable license throughout the world, to publish, translate, reproduce, deliver, perform, dispose of, and to authorize others so to do, all Subject Data now or thereafter covered by copyright: *Provided*, That with respect to such Subject Data not originated in the performance of this contract but which is incorporated in the work furnished under this contract such license shall be only to the extent that the Contractor, its employees, or any individual or concern specifically employed or assigned by the Contractor to originate and prepare such Data under this contract, now has, or prior to completion or final settlement of this contract may acquire, the right to grant such license without becoming liable to pay compensation to others solely because of such grant.

(d) The Contractor shall exert all reasonable effort to advise the Contracting Officer, at the time of delivery of the Subject Data furnished under this contract, of all invasions of the right of privacy contained therein and of all portions of such Data copies from work not composed or produced in the performance of this contract and not licensed under this clause.

(e) The Contractor shall report to the Contracting Officer promptly and in reasonable written detail, each notice or claim of copyright infringement received by the contractor with respect to all Subject Data delivered under this contract.

(f) Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(g) The Contractor shall not affix any restrictive markings upon any Subject Data, and if such markings are affixed, the Government shall have the right at any time to modify, remove, obliterate or ignore any such marking.

§ 9.203-2 *Limited rights to use data.*

#### RIGHTS IN DATA—LIMITED

(a) the term "Subject Data" as used herein includes writings, sound recordings, pictorial reproductions, drawings or other graphical representations, and works of any similar nature (whether or not copyrighted) which are specified to be delivered under this contract. The term does not include financial reports, cost analyses and other information incidental to contract administration.

(b) Subject Data delivered under this contract shall not be released outside the Government, nor be duplicated, used, or disclosed in whole or in part for procurement or manufacturing purposes (other than for manufacture required in connection with repair or overhaul where an item is not procurable commercially so as to enable the timely performance of the overhaul or repair work and provided that when Data is released by the Government to a contractor for such purposes, the release shall be made subject to the limitations of this clause and provided further that such Data shall not be used for manufacture or procurement of spare parts for stock, without permission of the Contractor, if: (i) the Subject Data to be so limited is identified in the Schedule as being subject to limitations; and (ii) the following legend is marked on each piece of data so limited [in third blank of legend, identify portion or pages to which legend is applicable]:

This \_\_\_\_\_ is furnished under U.S. Government Contract No. \_\_\_\_\_, and \_\_\_\_\_ shall be released outside the Government (except to foreign Governments, subject to these same limitations), nor be disclosed, used, or duplicated, for procurement or manufacturing purposes, except as otherwise authorized by said contract, without the permission of \_\_\_\_\_. This legend shall be marked on any reproduction hereof in whole or in part.

*Provided*, That such Data may be delivered to foreign Governments as the national interest of the United States may require, subject to the limitations specified in this paragraph. The Contractor shall not impose limitations on the use of any piece of Data, or any portion thereof, containing information first produced in the performance of a Government contract.

(c) Notwithstanding any provision of this contract concerning inspection and acceptance, the Government shall have the right at any time to modify, remove, obliterate or ignore any marking not authorized by the terms of this contract on any piece of Subject Data furnished under this contract, subject to the right of the Contractor to appeal under the "Disputes" clause from the decision of the Contracting Officer.

(d) Subject to the proviso in (e) below, the Government may duplicate, use, and disclose in any manner and for any purpose whatsoever, and have others so do, all Subject Data not covered by (b) above which is delivered under this contract.

(e) The Contractor agrees to and does hereby grant to the Government and to its officers, agents, and employees acting within the scope of their official duties, a royalty-free, non-exclusive and irrevocable license throughout the world, to publish, translate, reproduce, deliver, perform, dispose of, and to authorize others so to do, all Subject Data now or hereafter covered by copyright: *Provided*, That with respect to such Subject Data not originated in the performance of this contract but which is incorporated in the work furnished under this contract such license shall be only to the extent that the Contractor, its employees, or any individual or concern specifically employed or assigned by the Contractor to originate and prepare such Data under this contract, now has, or prior to completion or final settlement of this contract may acquire, the right to grant such license without becoming liable to pay compensation to others solely because of such grant.

(f) The Contractor shall exert all reasonable effort to advise the Contracting Officer, at the time of delivery of the Subject Data furnished under this contract, of all invasions of the right of privacy contained therein and of all portions of such Data copies from work not composed or produced in the performance of this contract and not licensed under this clause.

(g) The Contractor shall report to the Contracting Officer promptly and in reasonable written detail, each notice or claim of



copyright infringement received by the contractor with respect to all Subject Data delivered under this contract.

(h) Nothing contained in this clause shall imply a license to the Government under any patent. Nothing contained in this clause shall be construed as prohibiting the Government from manufacturing, or having manufactured for it by or procuring from others than the Contractor, that which is shown in or by such Data, so long as the Data, or a copy in whole or in part, to which the limitation in the above applies is not used in such manufacture or procurement.

## APPENDIX B

ASPR §§ 9.200-202.3 (15 Oct. 1958)

§ 9.200 *Scope of subpart.* This subpart sets forth the Department of Defense policy, implementing instructions, and contract clauses with respect to acquisition and use of data and copyrights. The policy and procedures set forth in this subpart apply to all data required to be delivered to the Government under a contract whether such data originates with the contractor or a subcontractor.

§ 9.201 *Definitions.* For the purpose of this subpart, the following terms have the meanings set forth below:

(a) "Data" means writings, sound recordings, pictorial reproductions, drawings, or other graphic representations and works of any similar nature whether or not copyrighted. The term does not include financial reports, cost analyses, and other information incidental to contract administration.

(b) "Proprietary data" means data providing information concerning the details of a contractor's secrets of manufacture, such as may be contained in but not limited to its manufacturing methods or processes, treatment and chemical composition of materials, plant layout and tooling, to the extent that such information is not disclosed by inspection or analysis of the product itself and to the extent that the contractor has protected such information from unrestricted use by others.

(c) "Other data" means all data other than "proprietary data" and includes:

(1) Operational data which provides information suitable among other things for instruction, operation, maintenance, evaluation or testing; and

(2) Descriptive data which provides descriptive or design drawings or descriptive material in the nature of design specifications which, although not including any "proprietary data," may nevertheless be adequate to permit manufacture by other competent firms.

(d) "Standard commercial items" means supplies or services which normally are or have been sold or offered to the public commercially by any supplier.

§ 9.202 *Acquisition and use of data.*

§ 9.202-1 *Acquisition of data — (a) General.* It is the policy of the Department of Defense to encourage inventiveness and to provide incentive therefor by honoring the "proprietary data" resulting from private developments and hence to limit demands for data to that which is essential for Government purposes. The activity responsible for initiating a purchase request, after consultation with the procurement activity whenever feasible, will carefully determine the use contemplated for the data to be acquired and will specify only such data as is determined to be necessary to satisfy such use. Generally it should not be necessary to obtain "proprietary data" to satisfy Government requirements. The acquisition of data from a subcontractor shall be governed by the nature and circumstances of the subcontract, it being the intent of the Department of Defense that in obtaining data originating with subcontractors, the contractor shall, insofar as carrying out its obligations under a prime contract is concerned, be guided by the same policies and procedures as if the subcontractors were contracting directly with the Government and should not request unlimited rights in "proprietary data" where such rights are not required by the Government under the prime contract.

(b) *Supply contracts and subcontracts thereunder.* In advertised contracts and in contracts and subcontracts for standard commercial items, "proprietary data" shall not be requested. "Proprietary data" will be obtained for the Government under other supply contracts and subcontracts thereunder only when a clear Government need for such data is established and in such event the requirement for "proprietary data" will be specified in the contract Schedule (see the clause in § 9.203-2). When "proprietary data" is obtained under supply contracts, there shall be a specific negotiation for such data and the contractual requirement shall be listed as a separate contract item.

(c) *Contracts for experimental, developmental, or research work and subcontracts thereunder.* In a contract which has as one of its principal purposes experimental, developmental, or research work and also calls for models of equipment or practical processes, the contractor shall be required to furnish to the Government for the price of the work all data resulting directly from performance of the contract, whether or not it would otherwise be "proprietary data." In addition, the contractor shall be required to furnish all data necessary to enable reproduction or, where appropriate, manufacture of the equipment or performance of the process which is developed, and the Schedule of the contract shall set forth the data required, subject to the exceptions set forth below:

(1) Such data shall not be required for standard commercial items to be furnished under the contract and to be incorporated as component parts in or to be used with the product or process being developed if in lieu thereof the contractor shall furnish identification of source and characteristics (including performance specifications, when necessary) sufficient to enable the Government to practice the process or to procure the part or an adequate substitute; and

(2) "Proprietary data" shall not be required for other items, including minor modifications thereof, which were developed at private expense and previously sold or offered for sale and which are to be incorporated as component parts in or to be used with the product or process being developed, if in lieu thereof the contractor shall identify such other items and that "proprietary data" pertaining thereto which is necessary to enable reproduction or manufacture of the item or performance of the process.

Where the contractor asserts and it is determined in the negotiation preceding the execution of the contract that the contractor has previously developed "proprietary data" other than that described in subparagraph (2) of paragraph (c) of this section, that such data will be used in the product or process developed under the contract, and that such product cannot readily be manufactured or the process practiced without the use of such previously developed "proprietary data," a suitable price (or provision thereof) may be negotiated: *Provided*, That the contractor requests payment for such data, and the Government does not have rights to such data (other than the "Limited Rights" provided for by the paragraph of § 9.203-3).

§ 9.202-2 *Use of data — (a) Other data.* When data other than "proprietary data" is obtained, it shall be obtained without any

limitation on its use by the Government.

(b) "*Proprietary data*" — (1) *Supply contracts*. When "proprietary data" is obtained by negotiation under a supply contract, in accordance with § 9.202-1(b), the purposes for obtaining it will govern its use. If it is obtained for the purpose of enabling the Government to establish additional sources of supply, it shall be obtained without limitation as to its use; in such case the contract clause in §§ 9.203-1 and 9.203-2 shall be included in the contract and the requirement for the "proprietary data" will be specified in the contract Schedule. However, where it has been determined to be necessary to obtain "proprietary data" for some limited purpose, such as emergency manufacture by the Government, such data may be obtained subject to limitation as to its use; in such case the contract clause in §§ 9.203-1, 9.203-2 and 9.203-3 shall be included in the contract and the contract Schedule shall suitably identify the data which shall be subject to limited use.

(2) *Contracts for experimental, developmental, or research work*. When "proprietary data" is obtained under a contract having as one of its principal purposes experimental, developmental, or research work, in accordance with § 9.202-1(c), it shall be obtained without limitation as to its use; in such case the contract clause in §§ 9.203-1 and 9.203-4 shall be included in the contract.

§ 9.202-3 *Multiple sources of supplies*. The Government's interest in establishing multiple sources for supplies and services arises when it is necessary to (i) insure fulfillment of its current and mobilization requirements or (ii) permit competition for defense procurement to avoid unreasonable prices. The policies in this subpart provide one means for accomplishing this objective and are particularly effective where data, other than "proprietary data," acquired by the Government, is useable, without more, to obtain multiple sources. Where the use of "proprietary data" is necessary for the production of an item developed at private expense, it is the policy of the Department of Defense to honor the proprietary nature of such data since it is recognized that it is in the Government's interest to foster private development of items having military usefulness. Accordingly, "proprietary data," not otherwise obtained pursuant to the policy set out in § 9.202-1(c), will be obtained by the Government for the purpose of establishing multiple sources only where such sources cannot otherwise be established. This should occur only in isolated cases as necessary to achieve the objectives in (i) and (ii). In preference to having the Government obtain "proprietary data" for the

purpose of creating multiple sources, it is the policy to achieve these objectives to the extent possible through one of the following procedures:

(a) The acquisition by the Government of "proprietary data" developed at private expense may be unnecessary where the primary source is willing to establish other sources by direct contractor licensing arrangements without Government participation. Where complex technical equipment is involved and the establishment of a satisfactory second source will require, in addition to data, technical assistance from the primary source or Government facilities or other unusual assistance, Government participation in any licensing and technical assistance arrangements between contractors may be necessary to protect the Government interest with respect to such factors among others, as (1) investment facilities, (2) competency of source, (3) timing of establishment of second sources, and (4) allocation of orders among sources.

(b) The acquisition of "proprietary data" developed at private expense may be avoided in many cases by providing for the development of suitable substitutes for such sole source items through the use of performance specifications. No single method can be prescribed for meeting the second source problem; each situation must be handled on its own merits.

## PUBLICATION NOTES

Various books, pamphlets, and periodicals, solicited and unsolicited, are received from time to time by the editor of the *Military Law Review*. With volume 80, the *Review* began adding short descriptive comments to the standard bibliographic information published in previous volumes. The number of publications received makes formal review of the majority of them impossible. Description of a publication in this section, however, does not preclude a subsequent formal review of that publication in the *Review*.

The comments in these notes are not recommendations either for or against the publications noted. The opinions and conclusions in these notes are those of the preparer of the note. They do not reflect the opinions of The Judge Advocate General's School, the Department of the Army, or any other government agency.

The publications noted in this section, like the books formally reviewed in the *Military Law Review*, have been added to the library of The Judge Advocate General's School. The School thanks the publishers and authors who have made their books available for this purpose.

Dougherty, James E. and Pfaltzgraff, Robert L., Jr., *Shattering Europe's Defense Consensus*. Elmsford, New York, Pergamon Press Inc., 1985. Pages: 215. Name Index. Subject Index. Price: \$19.95. Publisher's address: Pergamon Press Inc., Maxwell House, Fairview Park, Elmsford, New York 10523.

A number of individuals contribute to the striking success of this book. The authors in their distinct areas of responsibility develop skillfully the multifaceted issue of what effect, if any, has the increasingly militant Western European antinuclear groups had on the venerable NATO consensus on the defense of Western Europe.

What elevates this publication to a level of respect is its in-depth examination of the different antinuclear movements from a variety of perspectives: historical, cultural, political, and religious. As a result, one is able to discern why the antinuclear movement has enjoyed mixed degrees of success in Western Europe. Of primary importance to the survival of NATO and the defense of Western Europe, the lack of a monolithic antinuclear movement precludes the widespread ascendancy of national neutralism and pacifism and, thus, prevents the precipitous erosion of NATO and its consensus defense policy. Underlying this dynamic



process, according to the authors, is a desire to preclude the Soviet Union from exploiting the unrest spawned by antinuclear activist groups and gaining some strategic advantage.

The possible impacts—past, present, and future—of the various antinuclear movements in Western European countries are carefully analyzed. The overarching concern throughout the book is whether these movements place NATO in a vulnerable position either in terms of weakening or completely destroying it. If this should happen, the rhetorical question would become: "Will the Soviet Union reciprocate by disarming in the face of the dismantling of NATO?" The probable answer to this question demonstrates the significance of the antinuclear movement in Western Europe and the value of a book which presents a trenchant analysis of this issue. *Shattering Europe's Defense Consensus* is, therefore, a valuable addition to the literature in this field.

Etheredge, Lloyd S., *Can Governments Learn? American Foreign Policy and Central American Revolutions*. Elmsford, New York: Pergamon Press, 1985. Pages: 215. Index. Price: \$13.95. Publisher's address: Pergamon Press, Inc., Maxwell House, Fairview Park, Elmsford, New York 10523.

The provocative title of this book whets the reader's appetite almost instantly and serves as an entree to a fascinating analysis of the intricacies of United States foreign policy decision-making principally affecting Central America for about the last thirty-two years. Etheredge advances some extremely forceful arguments to support his thesis that a number of foreign policy forays by the United States in this region—in Guatemala, Cuba (especially noted), El Salvador, and Nicaragua—have evinced a common decision making flaw: an inadequate perception and judgment stemming mainly from an analytical approach too much wedded to imagery rather than to "outer reality." In analyzing these recurrent foreign policy decision making methods (in the author's opinion, many of which were patently deficient), the question—*Can Governments Learn?*—takes on a special significance.

Although one may disagree with some of the author's conclusions, the book will be thoroughly enjoyed by those who value effective, thoughtful writing.

Hoyt, Edwin P., *The Militarists: The Rise of Japanese Militarism Since WW II*. New York, New York: Donald I. Fine, Inc., 1985. Pages: 229. Appendices. Price: \$18.95. Publisher's address: Donald

I. Fine, Inc., 128 East Thirty-Sixth Street, New York, New York 10016.

"What is more than possible in 2001 is that China and Japan, in alliance, become a third superforce of the world, Japan supplying the high technology and China the manpower and national resources." This hypothetical conclusion to Chapter One, entitled "The Danger," lays the foundation for Hoyt's seemingly excessive apprehension of the recrudescence of Japanese militarism and its potentially untoward consequences for the world. Perhaps this recurrent theme throughout the book evinces an unseemly cultural distrust and enmity. To counteract Hoyt's somewhat alarmist message, it must be underscored that societies can and often do change with the passage of time. No group of people—including the Japanese—is inextricably tied to a certain philosophical bent. So it is a bit unnerving to read:

The Japanese, pushed now to increase their military effort, can be expected to continue to do so, year after year. There is an element of the herd instinct in this that is a little frightening. It is like watching the beginning of a cattle stampede. For as the Japanese know better than anyone, they are a "flock people," and as such can be turned in a certain direction once a consensus is achieved and thereafter will follow that way until some vital change in direction is forced on them by events.

That is the danger inherent in Japan's military buildup.

This kind of analysis greatly detracts from the intellectual content of the book, for existing Japanese competence and motivation do not necessarily portend the replication of insidious militaristic behavior of the past. Perhaps the United States Government, in encouraging the Japanese Government to shore up its military defenses (a policy ostensibly disfavored by the author), believes that the times have changed. And, as a consequence, what was true for Japan and the rest of the world in 1946 may no longer be true today. In reading this book, however, it is doubtful that Hoyt accepts this principle. Thus, from his pen springs a fetish for the irrelevant past which clouds his judgment of both the present and the future.

Reston, James, Jr., *Sherman's March and Vietnam*. New York, New York, MacMillan Publishing Company, 1985. Pages: 313. Index. Price: \$14.95. Publisher's address: MacMillan Publishing Company, 866 Third Avenue, New York, New York 10022.

Reston compares basically General Sherman's "March to the Sea" during the Civil War (along with its aftermath) to the Vietnam War (and its post-war period). He focuses primarily upon these comparative issues: (1) the degree of compliance with the law of war; (2) the reconstruction and reconciliation processes after both wars; and (3) the behavior of the principal military protagonists of the two wars—General William Tecumseh Sherman and General William Childs Westmoreland. In comparing and contrasting these foregoing areas of interest, Reston makes a valiant effort to demonstrate how Sherman's activities during and after the Civil War may have foreshadowed the manner in which the United States pursued the Vietnam War over 100 years later.

This book is an interesting analysis of two difficult periods in our nation's history. Reston, in pointing out an unusual number of similarities between these two epochal military events, appears to have shed some light on the motif of both wars which may properly guide United States military and civilian policymakers now and in the future.

Shelling, Thomas C. and Halperin, Morton H., *Strategy and Arms Control*. Elmsford, New York, Pergamon Press, Inc., 1985. Pages: 143. Appendix. Price: \$14.95 (hardcover) and \$9.95 (softcover). Pergamon Press, Inc., Maxwell House, Fairview Park, Elmsford, New York 10523.

In the preface to the book, the authors make these insightful observations:

It is our hope in re-releasing this book to contribute to the debate and to the effort to reduce the likelihood of war, its scope and violence if it occurs, and the political and economic costs of preparing for it, by a combination of negotiated agreements, informal arrangements, and sensible unilateral action. That is what we meant by arms control twenty-five years ago and what we mean now.

To be sure, the authors' hopes and expectations have been fully realized by the rerelease of this book. It is a masterful examination of an overall military policy which should be aimed at reducing the risk of war. Vital to this policy objective of risk reduction is a sensible arms control program. Shelling and Halperin outline precisely how arms control and the national military policy can be compatible if designed so that their goals are coterminous. The significance of this book is that its thesis, as it was twenty-five years ago, remains theoretically sound. That is,

the sensible, common strategy for arms control is inseparable from the national military policy: to reduce the risk of war between adversaries. But, more importantly, Shelling and Halperin do not appear to be zealots on the issue of arms control; they recognize that it should not monopolize the national military policy, but should simply be an integral component of a more comprehensive approach to avoid an unwanted war. Their keen insights combine to make the decision to rerelease this book an extremely prudent one.

## ERRATA TO VOLUME 113

A numbering error on the footnotes to Hagan, *Overlooked Textbooks Jettison Some Durable Military Law Legends*, 113 Mil. L. Rev. 163 (1986), made certain internal cross-references incorrect. The following typographical and numbering corrections should be made in the article:

- page 164, line 2, change "was more" to "were more";
- page 174, line 1, change "of Cinquecento" to "of the Cinquecento";
- page 179, line 12, change "Militarstrafgesetzbuch" to "Militärstrafgesetzbuch";
- page 182, line 11, change "affect" to "effect";
- page 187, lines 1 and 3, change "Roberts'" to "Roberts's";
- page 191, line 30, change "restein" to "restrein";
- note 1, change "undestanding" to "understanding";
- note 20, change "monarchs," to "monarchs";
- note 97, change "Roi.' the" to "Roi.' The";
- note 115, change "*supra* note 113" to "*supra* note 112";
- note 116, change "*supra* note 114" to "*supra* note 113";
- note 118, change "*supra* note 110" to "*supra* note 109";
- notes 124, 136, & 149, change "*supra* note 109" to "*supra* note 108";
- notes 129 & 198, change "*supra* note 128" to "*supra* note 126";
- notes 130 & 139, change "*supra* note 127" to "*supra* note 125";
- notes 134, 141, 145, 150, 158, 165, 168, 172, 186, & 202, change "*supra* note 132" to "*supra* note 130";
- note 138, change "*supra* note 115" to "*supra* note 114";
- notes 146 & 162, change "*supra* note 144" to "*supra* note 142";
- note 153, change "*supra* note 142" to "*supra* note 140";
- notes 154, 164, & 184, change "*supra* note 141" to "*supra* note 139";
- notes 163 & 183, change "*supra* note 140" to "*supra* note 138";
- note 197, change "date, Troops" to "date, troops".

1986]

PUBLICATION NOTES

By Order of the Secretary of the Army:

JOHN A. WICKHAM, Jr.  
General, United States Army  
Chief of Staff

Official:

MILDRED E. HEDBERG  
Brigadier General, United States Army  
The Adjutant General



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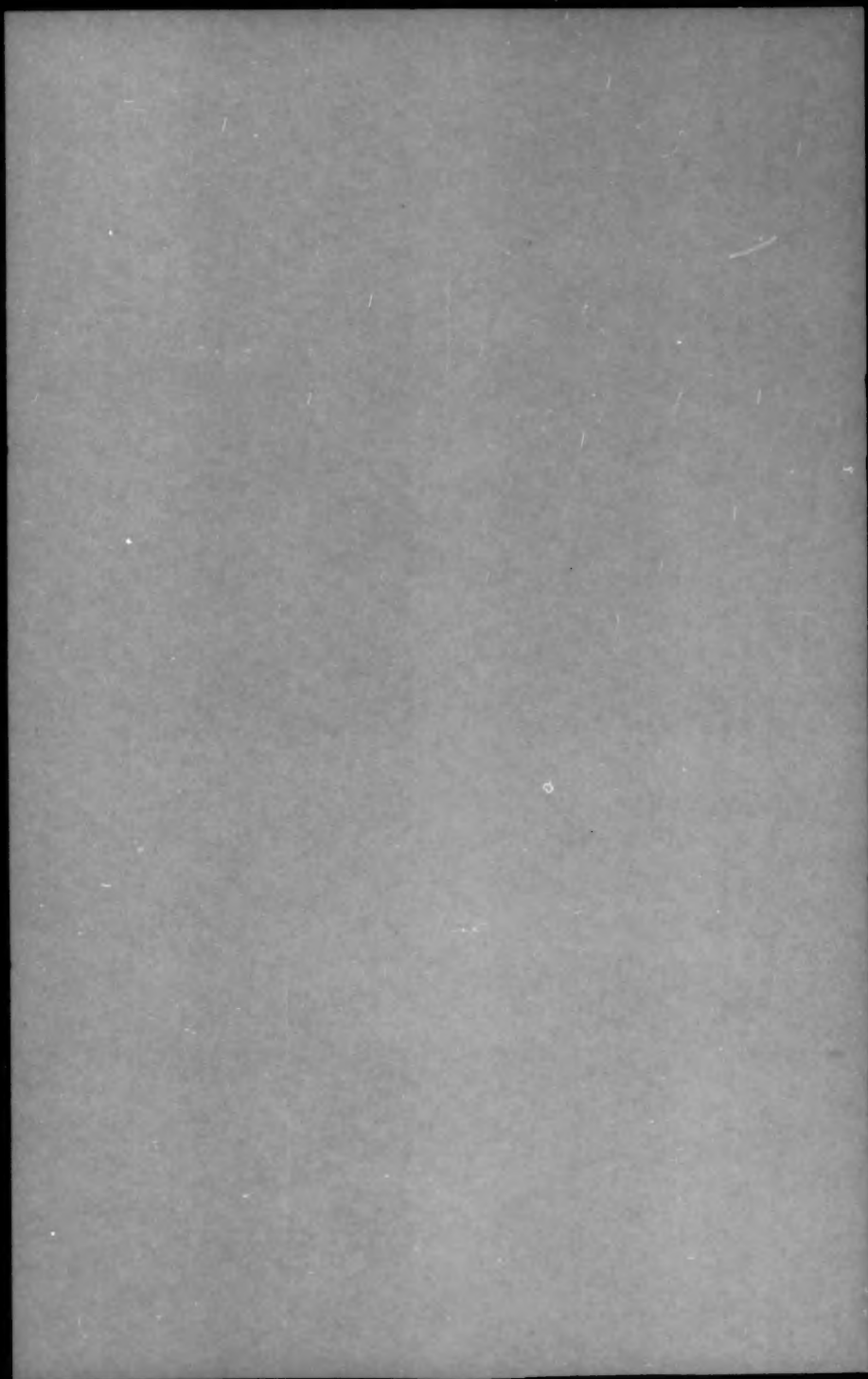
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